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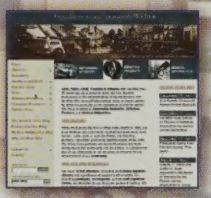

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THE
NORTH CAROLINA
STATE BAR
JOURNAL

Winter 2007
Volume 12, Number 4

Editor
Jennifer R. Duncan

 The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, 208 Fayetteville Street, Raleigh, NC 27601. Member rate of $6.00 per year is included in dues. Nonmember rates $10.70 per year. Single copies $3.21. The *Lawyer's Handbook* $10.70. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620. Periodicals postage paid at Raleigh, NC, and additional offices. Opinions expressed by contributors are not necessarily those of the North Carolina State Bar. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or e-mail (ncbar@bellsouth.net) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts.

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In the last Journal, we published the financial statements for the Chief Justice's Commission on Professionalism. In the 2006 column, the cash and cash equivalents should have been $159,123 not $59,123.

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United States Postal Service
Statement of Ownership, Management, and Circulation

1. Publication Title	2. Publication Number	3. Filing Date
North Carolina State Bar Journal	0 0 0 1 _ 5 0 4 9	9-29-2006
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Quarterly	4	$10.00

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4)*
208 Fayetteville Street Mall
Raleigh, NC 28403
Contact Person: Jennifer Duncan
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8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
208 Fayetteville Street Mall
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9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*
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12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*
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PS Form **3526**, October 1999 *(See Instructions on Reverse)*

13. Publication Title	14. Issue Date for Circulation Data
North Carolina State Bar Journal	Summer 2007

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			22,200	22,182
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	21,565	21,732
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
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c. Total Paid Distribution *(Sum of 15b (1), (2),(3), and (4))*			21,565	21,732
d. Free or Nominal Rate Distribution *(By Mail and Outside the Mail)*	(1)	Free or Nominal Rate Outside-County Copies Included on PS Form 3541	50	50
	(2)	Free or Nominal Rate In-County Copies Included on PS Form 3541	0	0
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail)	0	0
	(4)	Free or Nominal Rate Distribution Outside the Mail *(Carriers or other means)*	100	100
e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4)*			150	150
f. Total Distribution *(Sum of 15c and 15e)*			21,715	21,882
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))*			485	300
h. Total *(Sum of 15f and g)*			22,200	22,182
i. Percent Paid *(15c divided by 15f times 100)*			97.82%	99.31%

16. Publication of Statement of Ownership
☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Winter 2007 (Dec.) issue of this publication. ☐ Publication not required.

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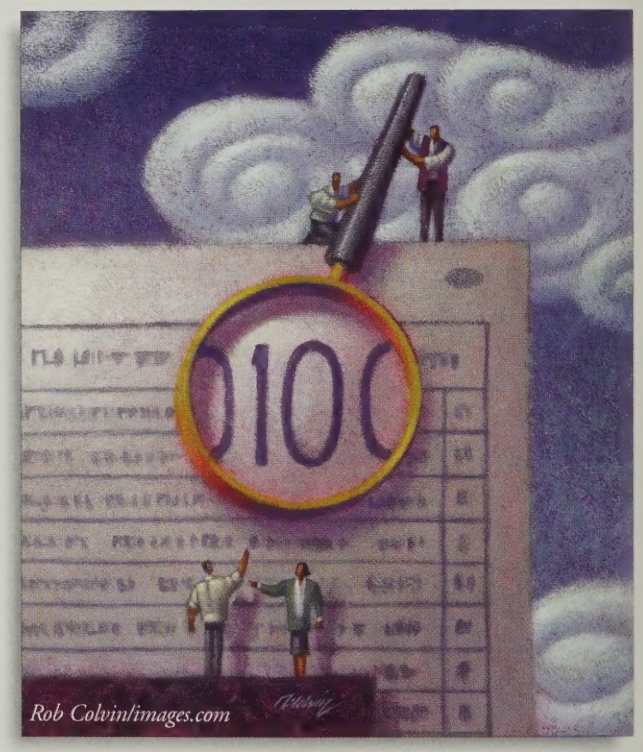
Examining North Carolina's New Tax Assessment, Refund, and Appeal Procedures

By Charles B. Neely Jr. and Nancy S. Rendleman

The following is part one of a two-part article. Look for the second installment in the Spring 2008 Journal.

The 2007 North Carolina General Assembly enacted sweeping reforms to the procedures for contesting tax assessments and for claiming tax refunds. These changes affect assessments and refund claims for corporate income, franchise, individual income, sales and use, and other taxes imposed and collected by the state.[1]



S.L. 2007-491 establishes new procedures to be followed by the Department of Revenue and taxpayers to resolve both assessments and refund claims within the department and, for the first time, provides for a prepayment appeal system under which a taxpayer may contest an assessment before an independent administrative law judge. The reform legislation also provides for new appeal procedures in the business court.

History

Prior to adoption of S.L. 2007-491, depending on the circumstances, North Carolina law had three different procedures by which a taxpayer could contest its tax liability. The traditional remedy for contesting tax assessments or for seeking tax refunds was found in G.S. 105-267, which traced its antecedents to the 19th century. Under G.S. 105-267, taxpayers could pay a tax under protest and seek a refund in superior court. Although not usually sought, trial by jury was available.

In the mid 20th century, G.S. 105-241.1 *et seq.* was adopted to allow taxpayers to contest an assessment through an administrative process, involving an appeal of the assessment on a prepayment basis to the secretary of revenue ("the secretary"), followed by an appeal to the Tax Review Board[2] on the record set before the secretary or his designee, with an appeal thereafter on the record to superior court. The taxpayer retained the right to forego this process, pay the tax, and sue under G.S. 105-267.[3]

The third alternative, G.S. 105-266.1, was adopted to allow for the recovery of "excessive or incorrect" tax payments by the filing of a claim for refund, followed by a hearing before the secretary, review of the secretary's decision by the Tax Review Board, and appeal thereafter to superior court. However, the courts made it clear that this remedy did not encompass constitutional challenges to the imposi-

tion of a tax,[4] and that constitutional challenges must be pursued under G.S. 105-267.

The statutory schemes created by these three statutes included different periods of limitations and different procedural requirements. Practitioners often found the interplay among the statutes to be confusing, and sometimes a trap. This confusion was compounded by court rulings which made it unclear whether constitutional challenges could be brought under G.S. 105-241.1 *et seq.* or only under G.S. 105-267[5] and what constituted a valid protest under G.S. 105-267.[6]

Taxpayers and practitioners representing taxpayers were particularly troubled by the lack of an independent prepayment hearing of assessment appeals outside the department. Under the appeals system set up by G.S. 105-241.1 *et seq.*, taxpayers' appeals were taken to an assistant secretary appointed by the secretary of revenue[7] whose office was located in the secretary's suite. Hearings were not subject to the rules of evidence, nor were the rules of civil procedure applicable. Taxpayer representation by counsel was not required.[8] The department resisted discovery, taking the position that taxpayers were not entitled to discovery in these hearings. Appeals from the secretary's decisions to the Tax Review Board and thereafter to superior court were on the record established before the secretary and were entitled to the deference given to decisions made in administrative appeals under G.S. 150B-51(b), unless the taxpayer opted to pay the tax and proceed under G.S. 105-267 with a trial *de novo.* Even though the department had worked in recent years to insulate its hearing officer from the department's influence, the statutory scheme did not lend itself to the independence taxpayers desired, nor did it provide for the statutory protections provided under the Administrative Procedures Act, G.S. 150B.

The council of the Tax Section of the North Carolina Bar Association had for some years taken the position that the tax appeals system demanded reform. In 2007, the North Carolina Bar Association formally endorsed the reforms set out in S.B. 242 (subsequently enacted as S.L. 2007-491). In 2004, the Council on State Taxation ("COST") had evaluated all 50 states' tax systems using a method that attempted to objectively analyze each state's treatment in its statutes of significant procedural issues that reflect whether a state provided "fair, efficient, and customer-focused tax administration." The 2004 COST study had ranked North Carolina 43rd of 50 states.[9] The 2007 COST study rated North Carolina even lower on the same criteria. *CFO Magazine* similarly ranked North Carolina "as having one of the least independent appeals processes in the country."[10] By 2006, North Carolina was one of only 15 states that did not provide an independent, prepayment appeals system.[11]

Confronted with criticisms of the tax assessment and appeal system, the General Assembly in its 2006 session directed its Revenue Laws Study Committee to study the system and to make recommendations to the 2007 session.[12] The Revenue Laws Study Committee made reform recommendations to the General Assembly as part of its report,[13] and these recommendations formed the core of S.B. 242.[14]

The new legislation repeals the statutes governing the administration and judicial review of disputed tax matters (generally effective January 1, 2008, except as noted other-

wise) and replaces them with a single unified procedure under which the procedure for handling tax refunds and reviewing tax assessments will be substantially identical. The new procedures are set forth methodically and logically. Appeals will be taken from a "final determination" of the department to the Office of Administrative Hearings ("OAH") where the record will be set and a decision made by an administrative law judge. Action by the secretary on the OAH's decision will result in the issuance of a "final decision" by the secretary. Thereafter a taxpayer may request judicial review in business court.

One remedy lost by taxpayers in the change to a unified tax appeal system is the right to pay the tax and proceed directly to court in a refund action under G.S. 105-267. This was a trade-off in the give and take of the legislative process. This remedy is available in the federal system, under which a taxpayer may sue for a refund in federal district court or the United States Court of Federal Claims, or proceed to tax court without payment of the tax.[15]

Requesting Refunds and Proposing Assessments

Refunds. The new legislation establishes a limitation period for requesting a refund of an overpayment of tax, for any reason, of three years after the due date of the return[16] or two years after payment of the tax,[17] whichever is later.[18] If a taxpayer timely files a return reflecting a federal determination, the period for requesting a refund is the later of one year after such return is filed or three years after the original return was filed or due to be filed, whichever is later. As under current law,[19] waiver of the statute of limitations by a taxpayer extends the time in which a taxpayer can obtain a refund to the end of the period extended by the waiver.[20]

A taxpayer may request a refund by filing an amended return reflecting an overpayment or by filing a claim for refund. Although the taxpayer must state the basis for the refund claim, the statement of the basis does not preclude the taxpayer from changing the basis for its claim thereafter.[21] Within six months of the date of the filing of the refund claim, the department must make the refund or partial refund (in which event the reason for the adjustment must be given), deny the refund and send a "notice of proposed denial," or request additional information concerning the requested refund. If the taxpayer provides the requested information, the department must act on the request for refund within the later of the end of the six month period, 30 days after receiving the information requested, or a time period mutually agreed upon. If the taxpayer does not respond, the department may deny the refund request.[22]

The notice of proposed denial of the refund must state the basis for the proposed denial. However, statement of the basis for the denial does not limit the department from changing the basis in the future.[23] If the department does not act on the request for refund within six months, the inaction is considered a proposed denial of the requested refund.[24]

Assessments. S.L. 2007-491 provides that the secretary may propose an assessment within the later of three years after the due date of the return[25] or three years after the taxpayer filed the return.[26] The periods of time for making an assessment or requesting a refund after the taxpayer files a return reflecting a federal determination are identical.[27]

The new legislation makes a significant change in the law regarding the ability of the secretary to make assessments following federal determinations. Under the old law, a correction or final determination by the federal government for a tax year opened up the entire return for that year to audit and assessment for any reason. Under G.S. 105-241.10, a taxpayer will be liable for additional tax only if the additional tax is the result of adjustments related to the federal determination. Similarly, the taxpayer will only be able to make a refund claim after a federal determination if the refund is the result of adjustments related to the federal determination. Except for adjustments related to the federal determination, this change to the law brings finality to tax years that under old G.S. 105-130.20 could remain open for audit and adjustment for extended periods of time—sometimes as much as six or seven years. The effective date for this change is for taxable years commencing on and after January 1, 2007.

The new legislation makes it clear that although a proposed assessment must set forth the basis for an assessment, the statement of that basis does not foreclose the department from changing that basis.[28]

The difference in the periods of limitation between G.S. 105-241.6(a)(2), which provides a two-year period after payment of tax for making a refund request, and G.S. 105-241.8(a)(2), which provides a three-year period after the taxpayer files a return for making a proposed assessment, raises the possibility that a taxpayer, under audit, might discover that it had a basis for a refund claim but the refund claim limitations period had expired. It has been department policy to allow a taxpayer caught in such a situation to provide information which would justify a reduction in the assessment even though the time for filing a refund claim has passed. The department intends to continue that policy of allowing an offset against an assessment although no refund will be allowed.[29]

As under prior law,[30] decisions of the secretary in making a proposed denial of a refund or in making a proposed assessment are presumed to be correct.[31]

Departmental Review of Proposed Assessments and Proposed Denials of Refunds

Under G.S. 105-241.11, a taxpayer who objects to a proposed denial of a refund or a proposed assessment may request a departmental review of the proposed action. The request for review must be filed within 45 days of the date the proposed action was mailed to or delivered in person to the taxpayer. The old law had allowed only a 30-day protest period. If no action is taken on a request for refund by the department within six months, the request for review must be filed within 45 days of the date that inaction by the department was considered a proposed denial of the refund (six months after the date of filing of the amended return or claim for refund).

Two points are worth noting. First, the potential for malpractice on the part of a practitioner and for loss of a refund claim on the part of the taxpayer exists if careful records are not kept of the date of filing the claim for refund, so that if the department does not act, the taxpayer knows to make a timely request for review. Second, taxpayers who plan to use the mail or a delivery service to deliver requests for review must allow for adequate time—and proof of delivery—to file their requests for review. A request for review is considered filed *only* when the department receives it, not when it is mailed.[32]

If the taxpayer does not file a timely request for review of a proposed denial of a refund, the proposed denial is *final* and is expressly not subject to further administrative *or* judicial review. If the taxpayer does not file

a timely request for review of a proposed assessment, the proposed assessment becomes final and is not subject to further administrative or judicial review. The taxpayer may, however, pay the tax and request a refund.[33]

If the taxpayer does make a timely request for review, the department must either grant the refund or remove the assessment, schedule a conference, or request additional information from the taxpayer. If the refund is not granted or the assessment not removed, the department must schedule a conference with the taxpayer, which may be by telephone or in person. Notice of the conference must be provided at least 30 days prior to the conference, unless the taxpayer agrees otherwise.[34] The conference is an informal proceeding designed to allow the department and the taxpayer an opportunity to resolve the case, identical to the informal process followed under the old law. The taxpayer may designate a representative to appear for him at the conference.[35] Failure of the taxpayer or a representative to attend the conference without prior notice to the department results in a statutory determination that the parties are considered unable to resolve the taxpayer's objection and the issuance of a final determination by the department.[36]

The taxpayer's representative at the informal conference need not be a lawyer. Under the department's procedures, the taxpayer's representative will be required to present a power of attorney, which may be obtained from the department's website (www.dor.state.nc.us), duly executed by the taxpayer and the representative.

According to the department, most appeals have traditionally been resolved with the informal conference. It is the authors' experience that the directors, assistant directors, and administration officers of the divisions who conduct such conferences, (e.g. the Corporate, Excise, and Insurance Tax; the Sales and Use Tax; or the Personal Taxes Divisions) are unfailingly professional, courteous, and knowledgeable, and will not hesitate to override the audit staff on a proposed assessment or to grant a refund if they are satisfied the taxpayer's position is correct.

Within nine months of the date the taxpayer files a request for review, unless the taxpayer and department agree to an extension, a final determination must be issued by the department.[37] The final determination must state the basis for the determination, which does not limit the department from changing the basis thereafter. During that nine-month period, the department and the taxpayer may agree on a settlement, may agree that additional time is needed to negotiate, or may fail to reach agreement, which will result in issuance of a final determination.[38]

One potential weakness in the new legislation is the failure by the General Assembly to address the situation in which the department does not timely issue a final determination. G.S. 105-241.14(c) makes it clear that failure to issue a notice of final determination within the required time does not affect the validity of a proposed assessment. However, the statute does not make clear what happens if the department fails to issue a notice of final determination. Presumably, the department will timely issue a final determination on a proposed assessment in order to expedite collection of the assessment. In the authors' experience, the department is heedful of mandates of the General Assembly and takes seriously its responsibilities under the statutes it is charged with administering. Hopefully, concern over protection of the state's fiscal status will not slow down the issuance of final determinations on refund claims. This potential weakness may need to be corrected in a technical corrections bill, however, because a taxpayer's appeal rights are triggered by the issuance of a notice of final determination. The legislation could be amended to provide that failure on the part of the department to issue a final determination constitutes a "deemed" final determination.[39]

Again, prudence indicates that taxpayers and practitioners should keep careful records of the time periods involved.

Transition Rules

The department has mailed letters to taxpayers outlining procedures in the transition from the old law to the new under the authority granted to the secretary in G.S. 105-264.[40]

The department has decided that the last date for hearings before the assistant secretary under G.S. 105-241.1 *et seq.* was October 31, 2007. Taxpayers who had hearings scheduled on or before that date may either proceed with a hearing before the assistant secretary with review thereafter by the Tax Review Board and the superior court under old G.S. 105-241.2 *et seq.*, or may decide to have their appeals heard by the Office of Administrative Hearings after January 1, 2008. Requests for hearings on proposed assessments or refund claims previously filed under old G.S. 105-266.1 will be treated as "requests for review" under new G.S. 105-241.11.[41] That will trigger a review process under new G.S. 105-241.13, which will involve a conference on 30 days notice with the department. If no resolution is reached at that stage, the department must issue a notice of final determination within nine months of the request for review. During that nine-month period, the department may request additional information from the taxpayer. The department intends that the nine-month deadline for taxpayers who filed requests for hearing prior to January 1, 2008, will begin to run on January 1, 2008.[42]

Upon issuance of the notice of final determination, the taxpayer will have 60 days to petition for a contested case hearing in the OAH, where an ALJ will try the case under the procedures set out in Chapter 150B of the General Statutes, as described in the second installment of this article to be published in the Spring 2008 edition of the *Journal*. We estimate the time for discovery, hearing preparation, hearing, and issuance of a decision to be at least a year, perhaps more likely 18 months, although given the fact that these cases will be an entirely new type of case for the OAH, it could take longer. In addition, the attorney general's staff believes that it will need five new lawyers to handle the new caseload and these lawyers will not be available, unless internal resources are shifted, until well after July 1, 2008, assuming the General Assembly authorizes them. S.L. 2007-491 directs the Revenue Laws Study Committee to study that issue.

If a taxpayer wishes to pursue its traditional remedy under G.S. 105-267, under which it would pay the tax assessed and sue for a refund in superior court, *it must act quickly to pay the tax, request the refund, and sue before December 31, 2007.* The department will attempt to expedite a denial of the refund claim so the taxpayer can proceed to court.[43] If a taxpayer has already paid the tax and requested a refund pursuant to G.S. 105-267 which has been denied, the taxpayer must file a lawsuit in superior court prior to December 31, 2007, in order to preserve any right to a refund. Because G.S. 105-267 is repealed effective January 1, 2008, the right to file a lawsuit requesting a refund will be lost after December 31, 2007. ■

Charles Neely and Nancy Rendleman engage in the practice of state and local tax litigation

Appendix—Timelines under S.L. 2007-491

EVENT	PERIOD	REFERENCE
Taxpayer requests refund of overpayment	Later of 3 years after due date of return or 2 years after payment of tax	GS 105-241.6(a)
Taxpayer requests refund of overpayment after federal determination	Later of 1 year after return reflecting federal determination filed or 3 years after original return filed or due to be filed, whichever is later	GS 105-241.6(b)
DOR acts on refund request	6 months after refund claim filed or 30 days after taxpayer responds to DOR information request, whichever is later	GS 105-241.7(c)
DOR proposes assessment	Later of 3 years after due date of return or 3 years after taxpayer files return	GS 105-241.8(a)
DOR proposes assessment after federal determination	Later of 1 year after return reflecting federal determination filed or 3 years after original return filed or due to be filed, whichever is later	GS 105-241.8(b)(1)
Taxpayer requests review of proposed denial of refund or proposed assessment of tax	45 days after: (1) notice of denial or assessment mailed; (2) date notice delivered in person, or (3) the lapse of 6 months after the filing of a refund claim without action by the Department	GS 105-241.11
DOR sets conference to discuss request for review	30 days notice, unless taxpayer agrees to shorten notice	GS 105-241.13(b)
DOR issues notice of final determination	9 months after request for review filed, unless both parties agree to an extension of time	GS 105-241.14(c)
Taxpayer files petition with OAH	60 days after notice of final determination delivered or mailed	GS 105-241.15; GS105B-23(f)
Secretary issues final decision	60-120 days after receipt of official record from OAH	GS 150B-44
Taxpayer files petition for judicial review of Secretary's final decision in Superior Court of Wake County in accordance with procedures for mandatory business court case	30 days after service of final decision on taxpayer	GS 105-241.16 GS 150B-45
Complaint filed challenging facial unconstitutionality of statute as sole basis for tax appeal	2 years after dismissal by OAH of petition	GS 105-241.17

with the law firm of Williams Mullen Maupin Taylor in its Raleigh, North Carolina, office. The authors represented the Council on State Taxation in advocating for the adoption of S.B. 242, which contained the legislative reforms set forth in S.L. 2007-491 discussed in this article.

Part two of this article, which will appear in the Spring 2008 edition, covers appeals to the Office of Administrative Hearings, procedures on hearings of tax cases before administrative law judges, and review by the secretary of revenue of OAH decisions. The second installment will also deal with appeals of final agency decisions in tax cases to the North Carolina Business Court, including the scope and standard of review, and direct appeal to the business court, without hearing in the OAH, of facially unconstitutional tax statutes.

Endnotes

1. S.L. 2007-491 did not affect the state's property tax assessment or appeals process. For a discussion of North Carolina's property tax appeal system, see Charles Neely & Nancy Rendleman, "North Carolina Property Tax Assessment and Appeals Procedure," *NC State Bar Journal*, Winter 2001.
2. A three member board consisting of the state treasurer, the chairman of the Utilities Commission, and a member appointed by the governor.
3. G.S. 105-241.4.
4. *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E. 2d 780 (1977); *Central Tel. Co. v. Tolson*, 174 N.C. App. 554, 559, 621 S.E.2d 186,190 (2005).
5. North Carolina cases are replete with statements that indicate that G.S. 105-267 is the only statute under which the constitutionality of a tax statute or the constitutionality of the secretary's actions might be challenged. *See, e.g., Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E. 2d 780 (1977); *Bailey v. State*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991) (*Bailey* I). However, in *A&F Trademark, Inc v. Tolson*, 167 N.C. App. 150, 605 S.E.2d 187 (2004), the court of appeals (in affirming a superior court decision in which the superior court affirmed a Tax Review Board decision sustaining an assessment) addressed the taxpayers' constitutional arguments in a case which had arisen under G.S. 105-241.1 *et seq.* and not under G.S. 105-267.
6. G.S. 105-267 provided that a taxpayer must "demand a refund of the tax paid in writing from the secretary," and a long line of NC Supreme Court and NC Court

of Appeals decisions made it clear that the law meant what it said. *Kirkpatrick v. Currie*, 250 N.C. 213, 216, 108 S.E.2d 209, 215 (1959); *see also Buchan v. Shaw*, 238 N.C. 522, 523, 78 S.E.2d 317, 317 (1953) (dismissing action because plaintiff had not followed the procedures prescribed by G.S. 105-267); *Javurek v. Tax Rev. Bd.* 165 N.C. App. 834, 840, 605 S.E. 2d 1, 5 (2004) (holding that, because plaintiff did not comply with the procedure prescribed by G.S. 105-267, the superior court lacked subject matter jurisdiction); *Salas v. McGee*, 125 N.C. App. 255, 259, 480 S.E.2d 714, 717 (1997) (because plaintiffs did not comply with the statutory refund demand procedures in G.S. 105-267, the trial court was barred from hearing their action); *47th Street Photo, Inc. v. Powers*, 100 N.C. App. 746, 749, 398 S.E.2d 52, 54 (1990) (holding that, in challenging a tax, plaintiff must proceed according to the requirements of G.S. 105-267). However, the NC Supreme Court held in *Bailey v. State*, 348 N.C. 130, 500 S.E. 2d 54 (1998) (*Bailey* II) that while claims of illegal or improper taxation are subject to the procedural requirements of G.S. 105-267, notice is only required to the extent necessary to provide the state with notice sufficient to protect the State's fiscal stability.

7. Under authority of G.S. 105-260.1.
8. *But see* G.S. 84-1 *et seq.* governing the authorized practice of law.
9. "Best and Worst of State Tax Administration: COST Scorecard on Appeals, Procedural Requirements," 11 *Multistate Tax Report*, March 26, 2004 at 137.
10. "Give and Take: As State Economic-Development Teams Offer Tax Breaks to Attract Companies, Revenue Departments Seek to Get That Money Back," *CFO Magazine*, Jan. 10, 2007.
11. "The Best and Worst of State Tax Administration: Scorecard on Tax Appeals & Procedural Requirements," *State Tax Notes*, May 14, 2007, at 475.
12. S.L. 2006-196.
13. Appendix E to Report to the 2007 General Assembly of North Carolina, 2007 Session, of the Revenue Laws Committee.
14. S.B. 242 was introduced in the Senate by Senator Dan Clodfelter, D-Mecklenburg, who tenaciously led the reform effort. Significant portions of HB 2038, introduced in the House by Rep. Pryor Gibson, D- Anson, were incorporated into S.B. 242 while under consideration by the House Judiciary-1 Committee, chaired by Rep. Deborah Ross, D-Wake, who, with Rep. Gibson, guided the bill through the House. The bill went through 21 drafts as legislative staff (Trina Griffin and Sabra Faires), representatives of the department, and the public commented on the evolving iterations, before the bill was presented to the Senate Finance Committee for consideration. In addition to COST and the North Carolina Bar Association, the bill was supported by the North Carolina Chamber of Commerce, the North Carolina Bankers Association and the North Carolina Retail Merchants Association.
15. For a criticism of this and other aspects of SB 242, see Jasper L. Cummings Jr., "New Procedures for Contested Tax Cases in North Carolina," *State Tax Notes*, September 3, 2007, at 635-39; for another perspective, see Kay Miller Hobart, "Lawmakers Adopt New Procedures To Review Tax Disputes," *State Tax Notes*, August 20, 2007, at 480.
16. The due date of a return is considered to be the extended "due date." A 1975 attorney general's opinion states that a claim for refund made within three years of the extended due date for filing a return is timely under G.S. 105-266. 44 N.C.A.G. 247 (1975). The department concurs in and has followed this opinion and intends to continue to do so. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007. *See* Corporate Tax Directive, CD-06-1.
17. Under G.S. 105-267, when tax payments were made in installments, the statute of limitations for a refund request did not begin to run until after the last installment payment of a tax was paid. *See Rent-A-Car Co. v. Lynch*, 39 N.C. App. 709, 251 S.E.2d 917 (1979). While there is no North Carolina Supreme Court case on this issue, federal cases cited in *Rent-A-Car Co.* support this decision in regard to federal estate tax. This precedent should continue to apply to the new statute.
18. See Appendix for an outline of time periods under S.L. 2007-491. The new limitations period is shorter than the former limitations period set forth in G.S. 105-267. Under G.S. 105-267, a taxpayer had three years from the date of payment of the tax to request a refund.
19. G.S. 105-266(c)(1) (current law, effective until January 1, 2008).
20. G.S. 105-241.6(b)(2). All statutory references to Chapter 105 hereafter are to the new law, unless indicated to the contrary.
21. G.S. 105-241.7(b).
22. G.S. 105-241.7(c).
23. G.S. 105-241.7(d).
24. G.S. 105-241.7(c).
25. S.L. 2007-491 extended the due date of corporate income tax and franchise tax returns by one month. G.S. 105-122(a)1, G.S. 105-130.17(a).
26. G.S. 105-241.8(a)(1). The filing of an amended return does not extend the statute for making an assessment, except as discussed below relative to federal determinations. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007.
27. G.S. 105-241.8(b); G.S. 105-241.6(b)(1).
28. G.S. 105-241.9(c)(1).
29. Telephone conference with Greg Radford, director Corporate, Excise, and Insurance Tax Division, NCDOR, September 12, 2007.
30. Old G.S. 105-241.1(a).
31. G.S. 105-241.7(f); G.S. 105-241.9(a).
32. G.S. 105-241.11(b).
33. G.S. 105-241.12.
34. G.S. 105-241.13(b).
35. *Id.*
36. G.S. 105-241.13(c)(3); G.S. 105-241.14(a).
37. G.S. 105-241.14(c).
38. G.S. 105-241.13.
39. Query whether a taxpayer could seek judicial relief to compel issuance of a final determination. *See, e.g.* G.S. 150B-44.
40. Letters of department to taxpayers dated September 7, 2007.
41. *Id.*
42. Telephone conference with Mr. Greg Radford, director of Corporate, Excise, and Insurance Tax Division, North Carolina Department of Revenue, September 12, 2007.
43. *Id.*

Early Lease Termination for Military Servicemembers and Their Dependents

By Michael S. Archer

Today's armed forces personnel and their families are uprooted with astounding frequency, with numerous deployments to the world's hot spots in addition to the periodic changes of duty station that have always been a staple of military life. Some of our marines and soldiers are going on their fourth or fifth combat tour. Both federal and North Carolina law provide some cushion to these frequent, jarring moves by allowing our warriors to terminate residential leases early without liability to pay rent through the entire contractual lease term. However, the rules are not well understood by landlords and military tenants.

Complicating matters is the fact that, in some circumstances, the tenant's move out liability may be different depending on which statute is applied. Further, some landlords use form leases containing military termination clauses that misstate the law, either by quoting outdated North Carolina law that has been amended, or by completely ignoring federal law, or both. This article is designed to explain the applicable statutes and the interplay between them in a manner both useful to

attorneys and accessible to landlords and tenants.

Q. I am an active duty servicemember (SM) and I have signed a lease for a 12-month period. There are six months left on the lease. Are there any laws that allow me to terminate the lease early and avoid paying rent for the rest of the lease term?

A. Whether you can get out of the lease early depends on the reason for termination. The Servicemember Civil Relief Act (SCRA), a federal law, allows for early termination in three instances:

- SM entered the lease before active duty military service;
- SM entered the lease while on active duty and then received permanent change of station orders; or
- SM entered the lease while on active duty and then received orders to deploy in support of a military operation in excess of 90 days.

Q. Are there any other laws that protect SM tenants and allow early lease termination?

A. Yes. In 2005, North Carolina passed an amendment to North Carolina General Statute 42-45. This statute allows for early lease termination when the SM tenant:

- Receives permanent change of station orders to depart 50 miles or more from the location of his current dwelling;
- Is "prematurely or involuntarily released or discharged from active duty with the United States Armed Forces;" or
- Is deployed for 90 days or more.

Q. These laws sound pretty similar. Which one should I use to terminate my lease?

A. In some cases only one of the laws will apply. For example, only the North Carolina law will apply when the servicemember is "prematurely or involuntarily discharged." On the other hand, only the SCRA will apply to leases entered into prior to military service. However, in many cases, such as when the servicemember receives PCS or deployment orders, both laws will apply. In such cases, use whichever law is most favorable to you under the facts of your case. You are entitled to the protection of both.

While the SCRA and North Carolina law have a great deal of similarity, there are subtle differences that can significantly affect how much rent you have to pay before you terminate your lease. Generally, if you have been in your lease for less than nine months, the SCRA will be more favorable to the tenant. How much you have to pay depends on the effective date of lease termination and liquidated damages.

Q. When is the effective date of lease termination under the SCRA?

A. Under the SCRA, lease termination is effective 30 days after the next rental payment is due following notice to the landlord. For example, suppose that your monthly rent is due on the 5th day of the month and that you deliver proper notice of termination to your landlord on April 28th. Your lease terminates, and your obligation to pay rent terminates, 30 days after May 5th.

Q. When is the effective date of lease termination under the North Carolina law?

A. Under NC General Statute 42-45, as amended, your lease terminates 30 days after the next rental payment is due after the landlord receives proper notice of intent to terminate, OR 45 days after receipt of notice, whichever is shorter. Here's an example. Let's say that the rent is due on the 5th of the month. You provide proper notice to terminate on April 6th. Your lease terminates 30 days after May 5th or 45 days after April 6th, whichever comes first. In this case, 45 days after the April 6th notice is shorter and is, therefore, the effective date of lease termination. However, if you terminate under North Carolina law and you have been in your lease less than nine months, you may also be required to pay liquidated damages.

Q. What are liquidated damages?

A. Liquidated damages are a penalty that may be imposed to compensate a party to a contract in the event certain things happen. In the case of early lease termination, liquidated damages are imposed not by the lease itself, but by the North Carolina law. Thus, if you terminate your lease under North Carolina law, you may be required to pay rent through the effective date of termination and the applicable liquidated damages.

Q. Under what circumstances do I have to pay liquidated damages?

A. Whether you have to pay liquidated damages depends on which statute you use to terminate your lease and how long you have been in your lease prior to termination. If you terminate your lease under the SCRA, you do not have to pay any liquidated damages, period. You must pay rent through the effective date of lease termination, but there are no further charges resulting from early termination.

If you terminate your lease under North Carolina law, you will be required to pay rent through the effective date of termination of the lease. In addition, you may be required to pay liquidated damages if you have completed less than nine months of your lease term. If you have completed less than six months of the tenancy, the maximum liquidated damage amount is one month's rent. If you have completed at least six months of your tenancy but less than nine months, the maximum is one half of a month's rent.

Q. It sounds like I always have to pay more under the North Carolina law. Can you think of any situation in which both laws apply that I would want to use North Carolina law rather than the SCRA to terminate the lease?

A. Yes. The North Carolina law will result in less expensive termination when you have been in your lease for nine months or more and you deliver notice to terminate more than 15 days before the next monthly rental payment is due.

For example, let's say that you have been in your lease over nine months and the next rental payment is due April 5th. It is March 6th when you decide to deliver notice of intent to terminate. Under the SCRA, the effective date of termination is 30 days after April 5th. You will wind up paying two months rent. Under the North Carolina law, the termination date is 45 days after delivery of the notice. (Remember, under NC law, termination date is 30 days after the next rental payment is due or 45 days after delivery of notice, whichever comes first.) Since you have been in the lease for at least nine months, there are no liquidated damages. Thus, in this scenario, you wind up paying 45 days rent under the North Carolina law and two months rent under the SCRA.

Q. What if the landlord quickly re-rents my residence to another tenant? What is the effect on liquidated damages?

A. The landlord is not entitled to liquidated damages under the SCRA. Even under North Carolina law, the landlord is

not entitled to liquidated damages unless he or she suffers actual damages; that is, despite reasonable efforts, is unable to re-rent the premises. Thus, for example, if the landlord rents the residence two days after you terminate your lease, the liquidated damages may not be greater than two days' rent.

Q. What kind of notice must I provide to the landlord?

A. The notice requirements under both statutes are the same. You must provide *written* notice and a copy of your military orders to the landlord. Or, instead of military orders, you can provide a letter from your commanding officer verifying the reason that you are terminating the lease; e.g., that you received PCS orders, that you have been involuntarily or prematurely discharged or released from active duty, or that you have been ordered to deploy in excess of 90 days.

Q. What about civilian spouses who sign the lease? Are their lease obligations terminated as well?

A. The North Carolina statute was passed to assist service members whose military duties cause them to leave the area. Therefore, termination by the servicemember terminates the spouse's obligation as well. However, the text of the North Carolina statute does not address that issue.

The latest version of the SCRA, on the other hand, makes it very clear that termination by the SM tenant terminates the obligations of the spouse and any other military dependent that may have signed the lease as well.

Q. What if my spouse signed the lease but I did not? Can my spouse use the SCRA or North Carolina law to terminate the lease?

A. If the spouse signed the lease on behalf of the servicemember;,such as by using a power of attorney, then the lease is covered to the same extent as if the servicemember signed the lease However, if the civilian spouse signed a lease in her own capacity and the servicemember did not, there is no protection under either statute.

Q. My lease has a military clause that addresses early lease termination. What effect does that clause have on my ability to terminate early?

A. Many leases contain so called "military clauses" that discuss the circumstances under which a servicemember can terminate a lease prior to the expiration of the lease term.

Many of them attempt to explain the law but get it wrong because they fail to take into consideration SCRA and/or they fail to take into consideration the 2005 amendment to North Carolina law. In any event, under the law, the lease can give you more lease termination rights than you would otherwise have under the statutes; however, the lease can not take any of these rights away. Any lease provision that affords you with less protection than you are given under the SCRA or the North Carolina statute is void.

Q. Is there any way that the landlord can make me waive or give up my right to early lease termination?

A. The North Carolina statute specifically says that its protections can not be waived or modified under any circumstances.

SCRA lease termination rights may be waived, but to be legally effective, such waiver must comply with certain requirements, including, but not necessarily limited to, the following:

- The waiver must be in writing;
- The waiver must be on a document separate from the lease;
- The waiver must be signed by the servicemember; and
- The waiver must specify the legal instrument (such as the lease) to which it applies.

If a landlord requires you to waive SCRA rights as a condition of renting the premises, we strongly suggest that you consider taking your business elsewhere and reporting the matter to the nearest legal assistance office and the base housing and housing referral office.

Q. What happens if neither the SCRA nor the North Carolina lease termination statutes apply to my case?

A. If neither of the lease termination statutes applies, you should review the lease to see if it gives you any special lease termination rights. Since leases are typically written entirely by landlords, chances are there won't be any special protection, but it's worth checking out. Assuming that neither statute applies and there are no special termination rights provided in the lease, then you are bound by the terms of the lease contract. If you leave the premises early in breach of the contract, the landlord is entitled to damages you caused as a result of the breach. These damages include the loss of rent due to any vacancy of the premises during the lease term. The landlord must take reasonable steps to mitigate the damages; that is, to re-rent the premises. The landlord may withhold the security deposit to satisfy these damages and may also sue you for any additional damages not covered by the security deposit.

Q. My landlord claims that I caused physical damage to the residence and is therefore withholding my security deposit and threatening to sue me for the cost of fixing the damage in excess of the security deposit. Can he or she do that?

A. This article addresses only a certain kind of damage—loss of rent due to the early termination of a lease. A landlord is also entitled to compensation for the tenant's destruction or physical damage to the premises beyond ordinary wear and tear. The rules concerning such physical damage are not within the scope of this article.

Q. Can I terminate the lease early if the premises are seriously damaged by flood, hurricane, or some other event that I did not cause?

A. North Carolina General Statute 42-12 provides that if the rental residence is damaged so badly that it cannot be made reasonably fit, except at a cost in excess of one year's rent, the tenant may terminate the lease without penalty. However, the tenant must pay rent up to the time of the damage and must notify the landlord of intent to terminate *in writing and within ten days* of the damage. Read the lease carefully. This provision of the law only applies if the lease does not contain some other arrangement concerning destruction of the premises. Many of them do.

Q. What if I have other questions about lease termination or other rights as a tenant?

A. Contact a private attorney or your legal assistance office. In either case, when you meet with legal counsel, make sure to bring a copy of your lease, any correspondence between you and your landlord, any eviction notice, and any other pertinent documents, photos, or records. These records can help your attorney to properly advise you. ■

Michael S. Archer serves on the North Carolina State Bar's LAMP Committee. He is a retired marine and now works as a civilian in the marine JAG office at Camp Lejuene.

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FOR THE ISSUES OF LIFE IN LAW

No! Arbitrators Do Not Simply "Split the Baby"

By William K. Slate II

Old canards are long lived: "judges just turn criminals loose," "all politicians are corrupt," "arbitrators just split the baby." Unsubstantiated generalizations, of course, abound in all aspects of life and sometimes it is difficult to ascertain the origins for a repeated "urban myth." The notion that arbitrators simply "split the baby" or evenly divide assets when awarding cases continues to be suggested in some circles. And while the data prove quite to the contrary, it is more difficult to ascertain the genesis of such assumptions.

It is sometimes suggested that an exasperated losing party will offer such an explanation when confronted with having to explain a given result. This may have more likely been the case historically when arbitrators typically delivered laconic and conclusionary written awards without the benefit of supporting explanations. The very manner in which arbitrators arrive at their awards is itself sometimes misunderstood, and one school of thought suggests that a compromise result is simply easy to achieve.[1] Several authors have asserted the occurrence of a "split-the-baby" result,[2] although the scant empirical record illustrates contrary results.[3]

The 2007 Study

In an effort to analyze this question yet again, research staff of the American Arbitration Association recently undertook a review of all closed international arbitration cases which were administered during calendar year 2005. The administration of those cases was conducted by the International Center for Dispute Resolution (ICDR), which is the international division of the American Arbitration

Association.

To understand the ultimate data set examined in detail, it is important to know that 473 commercial arbitration cases were finalized in calendar year 2005. Of those, 32% of the cases reached an award; 39% were settled by the parties; and 17% were withdrawn. This means that 153 cases reached a final award in that calendar year and were initially considered for review. Subsequently, 42 of those cases were removed from the study due to the presence of a significant non-monetary award or incomplete information at the time the research was conducted. As a consequence, 111 international commercial arbitration cases administered by and awarded through the ICDR in 2005 constituted the final sample for the research here discussed.

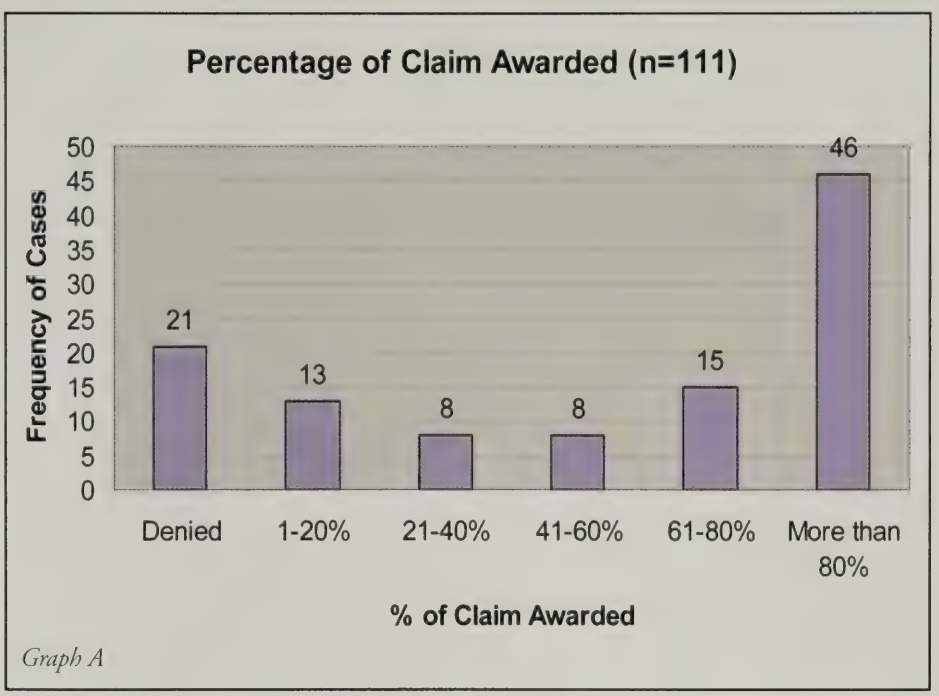
Research Methods

In analyzing the referenced cases, the files of the sample cases were reviewed for the final claim, counterclaim, and amount awarded information. The monetary value of the award in each case was then measured against the file claim and counterclaim amounts. The comparisons were then charted and graphed to reveal trends in the awarding of cases. Claims and counterclaims were maintained separately for analysis purposes. Since each counterclaim represents a unique new claim, we measured it against the corresponding counterclaim award only.

The primary findings from the study are set out in the Graph A.

The "U" shape of this bar graph demonstrates the greater incidence of decisive arbitral awards over "split" awards as demonstrated by the shorter bars in the center. Fully 21 of the 111 claims (19%) were denied, receiving 0% of the asked for value of the claim. Thirteen cases (12%) received up to 20% of the claim value. Forty-six cases (41%) were awarded a significant proportion (greater than 80%) of the claimed amount. The preponderance of cases in this study were found to represent decisive arbitral judgments in favor of the claimant or the respondent. Eighty cases totaling (72%) were observed within 20% of a full denial or full award of the claim.

A wider view of divided awards, considering the 31%-70% range represents 20 of the 111 cases or 18%.



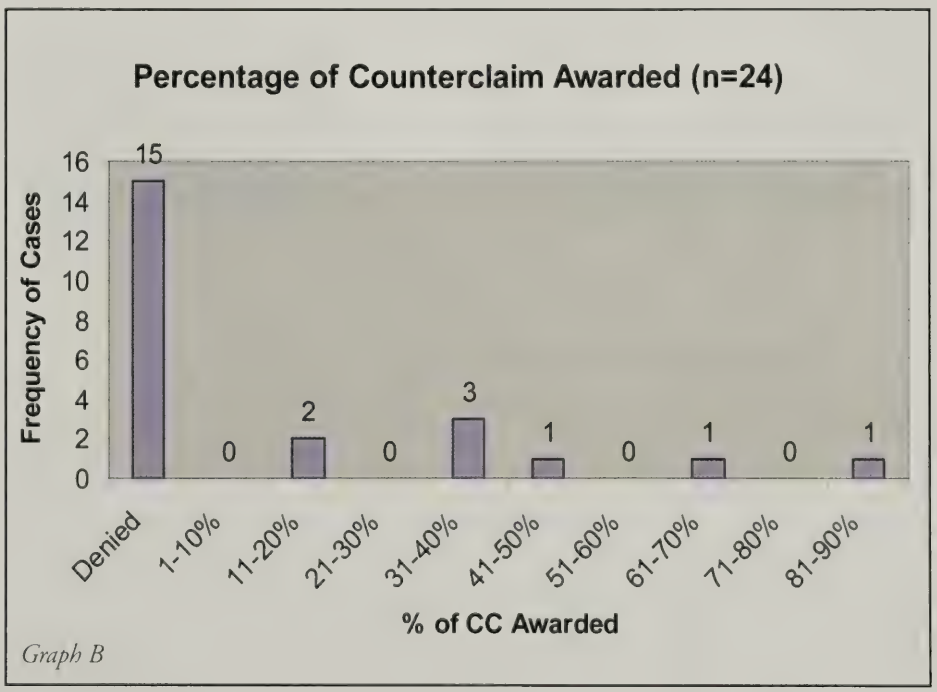
Graph A

It is important to note that the cases concluded by awards falling in the spread of 41%-60% of claims (only eight cases) tend to involve complex, multi-part claims, or require the valuation of large-scale damages. The award documents for those cases are often reasoned, describing in detail the claims, responses, testimony, and conclusions of law in addition to the final arbitration award. 93% of the studied cases were awarded outside the claim midrange.

Counterclaims

See Graph B below. Respondents among the 111 cases studied lodged 24 counterclaims. The graph representing the data related to those 24 counterclaims is set out below.

Nearly two-thirds (63%) of the referenced counterclaims were denied, receiving no monetary award. Only one counterclaim (4%) in this sample received an award in the middle range of 41%-60% of



Graph B

the amount claimed. These results, including a significant propensity to deny counterclaims all together, and a very small occurrence of split awards among counterclaims, echoed the findings of a larger AAA study reviewing all commercial awards issued in calendar year 2000. That study with a much larger sample size found 71% of counterclaims denied and similarly 4% of counterclaims awarded in the midrange.

Results of the Study

The analysis of both the final awards in chief and the counterclaim awards in the study clearly contradict the belief that a majority of arbitration cases will result in an evenly divided award, or a "split the baby" outcome. Awards in the majority of cases studied were decisive and arbitrators typically did not deliver evenly divided awards in either the claim or the counterclaim categories.

Past AAA Research

Prior to the 2007 study here discussed, the American Arbitration Association conducted two prior studies exploring the "split the baby" phenomena. The first was a widespread review of 4,479 domestic and international awards concluded during calendar year 2000. The second such study published in 2002 was a careful review of 54 randomly selected international commercial arbitration cases awarded between calendar years 1995 and 2000. In each of those studies the results produced similar findings: in the 2000 case study only 9% of all awards fell within the 41%-60% of "amount awarded" category, and in the 2002 study 10% of all awards were in the midrange. The inescapable conclusion being that most arbitrators tended to award a large percentage of the claim made, or little to none of the amount sought by the claimant. Only a small proportion of those cases demonstrated an award that was "split" or divided near the halfway mark of the claim—again, consistent with the statistics in the instant study.

One may properly ask, "Will the third conclusive study in the past seven years put the myth to rest?" In optimism, I would suggest that the answer might be yes—especially if the factual results are stated affirmatively, "No, arbitrators do not simply split-the-baby!" ■

William K. Slate II is president and chief executive officer of the American Arbitration Association.

Endnotes

1. The Conciliation and Arbitration of Industrial Disputes - 11: "The Machinery of Conciliation and Arbitration: An Analysis," *Ind-US. Lab. Rev.* 5 (2) (1926) 582; Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Indus. Rel.* (1966) 38-52; Charles Feigenbaum, "Final Offer Arbitration: Better Theory than Practice," 14 (8) *Indus. Rel.* 313 (1957).
2. *Id; See also* F.A. Starke & W.W. Notz, "Pre-and Post-Intervention Effects of Conventional vs. Final Offer Arbitration" *ACAD. MGMT. J.* 24 (1981) 832-850.
3. Contra Max. H. Bazerman & Henry S. Farber, "Analyzing the Decision-Making Processes of Third Parties" *Sloan Man. Rev.* 27 (1) (1985) 39-48; Henry S. Farber, "Splitting the Difference in Interest Arbitration" *Indus. Lab. Rel. Rev.* 35 (1981) 70-77; Max H. Bazerman, "Norms of Distributive Justice in Interest Arbitration" *Indus & Lab. Rel. Rev.* 38 (1985) 558-570.

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Case Flow in the North Carolina Court of Appeals[1]

BY SAM HARTZELL

The words of 19th century politician William Gladstone, "justice delayed is justice denied," have become such a part of the modern lexicon that they are familiar to even casual observers of the legal system. While the truth of this statement is rarely—if ever—disputed, little attention has thus far been paid to the speediness of the North Carolina Court of Appeals. This paper attempts to take a comprehensive look at case flow in the North Carolina Court of Appeals and compare the speed at which cases move to the standards put forward by the American Bar Association Guidelines.

The American Bar Association (ABA) published *Standards of Judicial Administration Volume III* (the "ABA Guidelines") in 1994 to "assist in achieving case flow management that is efficient, productive, and produces quality results." According to the Guidelines, "75% of all cases should be resolved within 290 days from filing notice of appeal" and "95% of all cases should be resolved within one year of the filing of the notice of appeal."[2] In 2005, court of appeals cases took roughly twice as long.

Background

Since 1967 the North Carolina Court of Appeals has functioned as the intermediate appellate court for the North Carolina judicial system. In calendar year 2005, the court's 15 judges, sitting in panels of three, ruled on 1,635 cases, 40% of which were decided by published opinion. In contrast, during 2005 the North Carolina Supreme Court decided 96 cases. Thus, the court of appeals is the appellate court that decided the great majori-

ty (95%) of appeals in the North Carolina judicial system, and the pace at which cases move through the court of appeals effectively determines the speed of the appellate process in the North Carolina Courts.

The court of appeals makes its opinions available on its website (www.nccourts.org/Courts/Appellate/Appeal), and the opinions include introductory language identifying both the date of the lower court ruling appealed from and the date on which the case was "heard" by the court of appeals.[3] The North Carolina Court of Appeals Electronic Filing Site and Document Library can be accessed through the court's website, and it identifies the dates on which records on appeal are filed with the court. From these sources it is possible to identify the following dates for each case:

- the date of the lower court ruling that is the subject of the appeal
- the date on which the record on appeal was filed with the court of appeals
- the date on which the parties' briefs were submitted
- "hearing" date in the court of appeals
- the date the court rendered its decision

From these dates it is possible to draw conclusions about which steps in the appellate process account for the greatest delay.

Under the sponsorship of a Summer Undergraduate Research Fellowship made available through the UNC-Chapel Hill Office of Undergraduate Research and financed by the University of North Carolina General Administration's Undergraduate Research Fund, data was compiled on court of appeals cases decided during 2005.[4] In addition, information on cases decided in June 2007 has also been presented for the purpose of contrasting the 2005 information with information from mid-2007.

Average Duration of Cases on Appeal

Cases decided by the court during 2005 were decided, on average, approximately 15 to 17 months after the estimated date of the notice of appeal.[5] "Average" is a term with multiple arithmetical meanings. The *mean* time for an appeal—total aggregate time for all appeals, divided by number of cases—was 16.39 months. In contrast, the median appeal time—the appeal time of the case precisely in the middle of the pack—was 15.61 months. Median time may be a more informative average because it is affected less by the small number of cases that took an unusually long time: 34 cases decided in 2005 had an appeal time of over three years, and these cases had a substantial effect on calculation of the mean.

Figure 1: Median and Mean Time between Notice of Appeal and Final Ruling by Type of Case

Figure 1 shows the mean and median appeals times for cases decided by the court during 2005. The distribution for the appeal times of all the 2005 decisions by the court of appeals (criminal and civil) is shown in Figure 2.

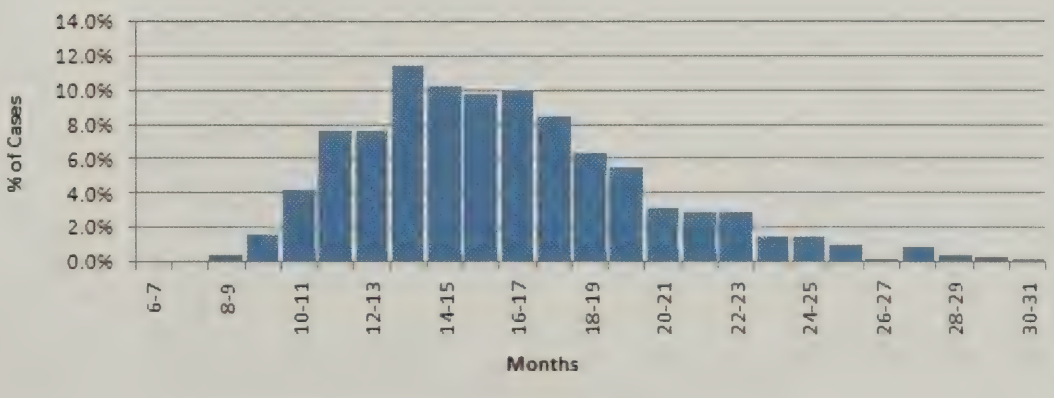
Components of Delay

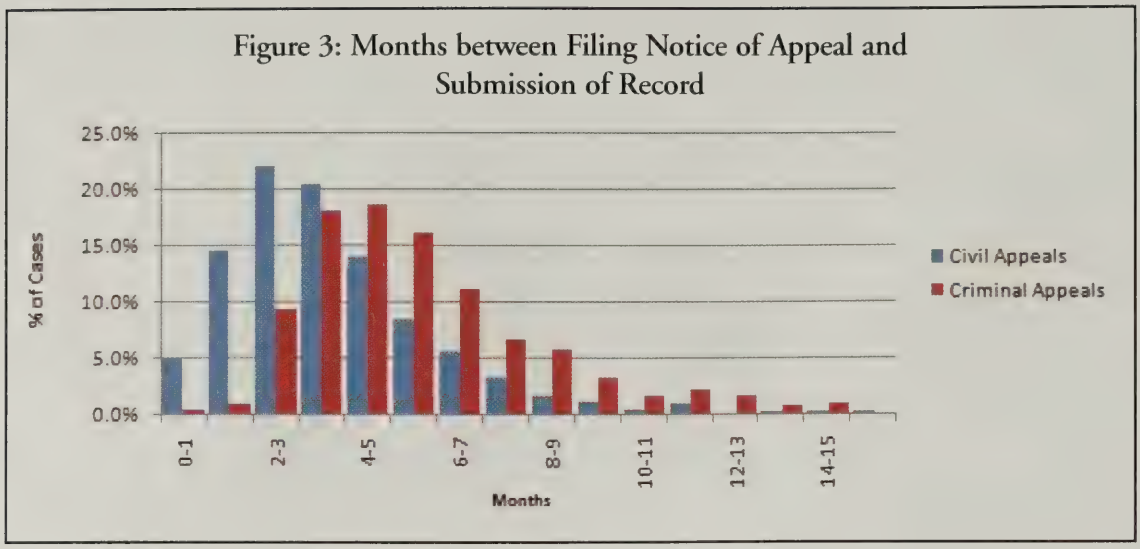
The data examined permit conclusions about the duration of various phases of the appellate process. The ABA Guidelines prescribe time standards for the various stages of an appeal.

Preparation of Record on Appeal

The first stage of the appeal process is preparation of the record. The ABA Guidelines state that this function should be completed within 30 days from the filing of the notice of appeal.[6] Without taking a look at the actual data, it was clear that North Carolina was unlikely to meet this standard; the North Carolina Rules of Appellate Procedure require that the record be filed within 50 days under ideal conditions, and the timeframe allowed balloons quickly if there is disagreement over the content of the record. The data confirms this hypothesis: nearly 97% of North Carolina appeals decided in 2005 failed to meet this guideline.

Figure 2: Months between Notice of Appeal and FInal Ruling





Median times required to prepare the record were 3.4 months (103 days) for civil cases and 5.2 months (158 days) for criminal cases.

Transcripts are generally part of the appellate record, and the significance of transcripts to appeal delays is well recognized. The ABA Standards of Judicial Administration cite transcript preparation as the single greatest cause of appellate delay.[7] In 2003 then Chief Justice I. Beverly Lake Jr. advised the General Assembly that "the lack of sufficient court reporter resources is probably the single factor most responsible for extreme delay in appellate review of cases."[8] In fiscal 2003-04, the North Carolina court system had the equivalent of 105 full-time court reporters with an annual salary budget of $4,275,986. In fiscal 2006-07, the number was 107, but the budget had been increased to $5,394,002.[9]

As shown in Figure 3, in criminal cases the record was submitted on average (median) 1.8 months later than in civil cases. Criminal appeals were disproportionably likely to have record preparation take longer than one year (4.8% of criminal cases vs. 1.7% of civil cases), and rarely in criminal cases was the record on appeal submitted within two months of notice of appeal (1.7% of criminal cases vs. 19.5% of civil cases). The shortage of reporters cited by Chief Justice Lake may help explain the disparity between criminal and civil cases, as criminal cases are more likely to require a transcript.

Briefing

The ABA Guidelines suggest that appellants' briefs be due "within 50 days of the filing of the record," and that appellee briefs be filed within 50 days after appellant briefs. Under the ABA Guidelines, 103 days is the maximum time that should elapse between submission of the record on appeal and filing appellee's brief (because cases are scheduled for oral arguments before any reply briefs are filed, reply briefs do not affect the overall progress of appeals and can therefore be disregarded). Roughly 40% of court of appeals cases met the ABA Guideline. Median time was 3.74 months (113 days), about one week slower than the Guidelines propose.

Setting the Hearing

The ABA Guidelines suggest that oral argument be heard within 55 days of filing of appellee's brief, and that cases submitted without oral argument be submitted to the assigned panel within 35 days of appellee's brief. For comparison purposes, this paper uses 55 days as the ABA Guideline. More than 98% of cases decided in 2005 exceeded the 55 day maximum suggested by the guidelines. The median time taken was 4.17 months (127 days).

Deciding the Case

The ABA Guidelines set out complicated recommendations for the time involved in preparation of appellate opinions: 90 days generally, 125 days for "cases of extraordinary complexity," plus up to 15 additional days for dissents.[10] Direct comparison to the ABA Guidelines is difficult because the language of the guidelines is purposely ambiguous to allow flexibility. However, by any standard, this aspect of the North Carolina appellate process is fast: the court of appeals' average (median) case decided in 2005 took only 70 days from the "hearing date" to publication of the decision, 20 days faster than the more stringent standard of 90 days. Treating the ABA Guideline as 90 days, over 60% of court of appeals cases met this standard.

How Typical was 2005?

In order to determine whether 2005 data is relevant to the pace at which appeals are currently being processed, data from June of 2007 was compared to data from 2005.[11] The results of this comparison suggest that cases in the court of appeals were moving at roughly the same pace in 2007 as in 2005. Median time for the preparation of the record decreased by 10 days. Briefing took longer by approximately 43 days, but it took approximately 38 fewer days for cases to get to their "hearing" date. Deciding the case took 21 fewer days. Overall, the median time taken to resolve an appeal dropped by 26 days, but this is well within the variation seen between months in 2005. Statistical modeling estimates the probability that the difference in overall time taken to resolve appeals was due to natural month-to-month variation to be 72%.[12] Put differently, there is good evidence that the increase in speediness is not meaningful. For a comparison of June 2007 to 2005 as a whole, see Figure 4.

Sources of Delay

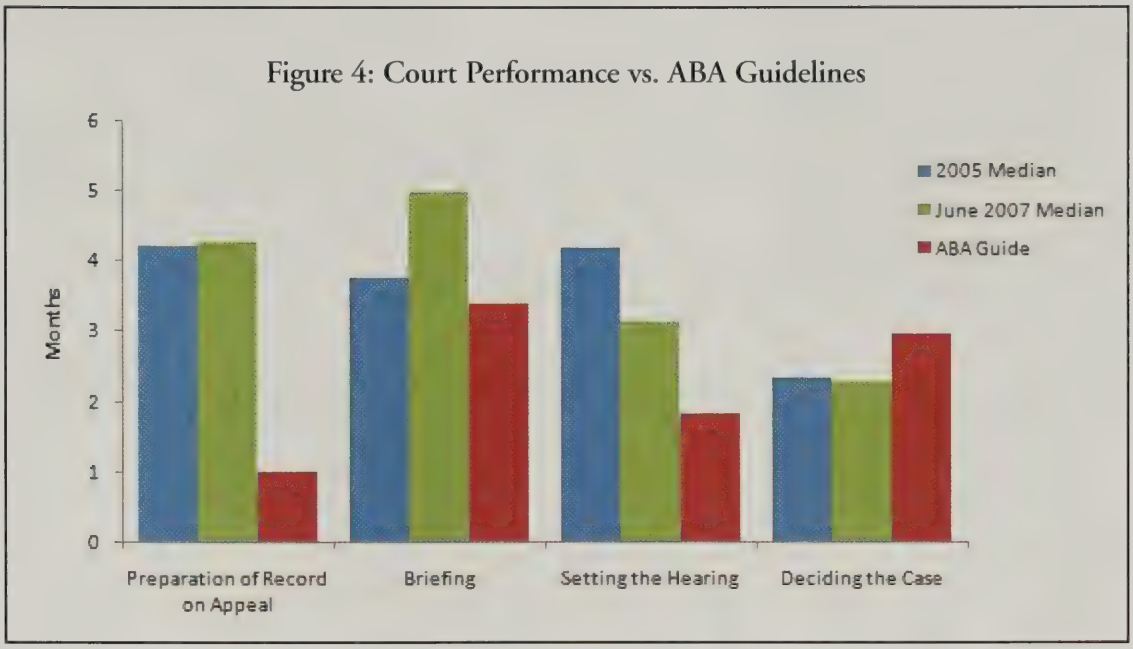
The principal cause of delay for cases decided by the North Carolina Court of Appeals in 2005 was the time taken to prepare and submit the record. (See Figure 4.) If records on appeal had been submitted within the time recommended by the ABA Guidelines, appeals during 2005 would have moved more quickly by approximately three months.

The second most serious cause of delay was the time required to schedule "hearings"—oral argument, or submission of cases without argument. If arguments had been scheduled as quickly as recommended by the ABA Guidelines, appeals would have moved more quickly by approximately two months.

Policy Implications and Conclusion

Cases in the North Carolina Court of Appeals move substantially more slowly than

ABA Guidelines suggest, even though the judges on the North Carolina Court of Appeals decide more cases per judge than the average for state appellate courts.[13] Cases in the court of appeals also move substantially more slowly than cases in the federal courts of appeals: median time for resolution in the federal appellate courts was 11.8 months, 8 months in the fourth circuit, as opposed to 15.6 months for the North Carolina Court of Appeals.[14] The key area in which increased efficiency may be possible is the preparation of the record on appeal. Transcript preparation is one issue, but preparation of the record could apparently also be expedited by changing the process by which the record on appeal is settled. The federal system, in which records of appeal are handled by clerks of court rather than by counsel, and which dispenses with assignments of error, may be a model worth consideration. Finally, attorneys in individual cases have the ability to affect the speed at which their particular appellate record is prepared and, consequently, the speed at which their case moves through the appellate court.



From the data on cases decided during 2005 by the North Carolina Court of Appeals, a couple of broad conclusions can be reached. First, appeals move slowly, and criminal appeals move more slowly than civil appeals. Second, there is some backlog in the court of appeals, as evidenced by the amount of time taken to schedule a hearing after briefs have been submitted. This may be less true as of June 2007 than it was in 2005, but hearings are still scheduled much more slowly than the guidelines suggest. Third, the judges on the court of appeals do not appear to be the cause of delay. Fourth, the time spent in preparation of the record on appeal is responsible for the greatest delay, and there is evidence to suggest that this is due, in part, to court reporter resources. And fifth, the attorneys involved in an appeal can greatly affect the speed of the appellate process, particularly by speeding up settlement of the record. ■

Sam Hartzell is a senior political science and philosophy major at The University of North Carolina at Chapel Hill. He plans to attend law school in the fall.

Endnotes

1. I would like to thank Professor Vanberg at the University of North Carolina, Jerry Hartzell, and clerk of the North Carolina Court of Appeals John Connell for their help throughout this process. I would not have been able to write this without them.
2. American Bar Association, Standards *Relating to Appellate Courts* (1994).
3. While all opinions contain language "Heard in the court of appeals," most appeals are decided without oral argument.
4. Analysis omits eight opinions with incomplete information. In addition, the data excludes 20 cases remanded from the North Caroline Supreme Court, and 79 cases heard pursuant to a grant of certiorari.
5. The date of notices of appeal is not provided in the court's opinions and is not available from the Electronic Filing Site. Dates of notices of appeal were therefore estimated by adding 30 and 14 days to civil and criminal cases, respectively. *See* Rules 3(c)(1), 4(a), N.C. Rules App. Proc.
6. *Ibid.*
7. *Ibid.*
8. *State v. Berryman*, 360 N.C. 209, 227, 624 S.E.2d 350, 363 (2006) (dissent of Brady, J.).
9. Information supplied by Jennifer L. Green, NC Administrative Office of the Courts, July 16, 2007.
10. American Bar Association, *Standards Relating to Appellate Courts* (1994).
11. June 2005 was also compared to 2005 as a whole to see whether June is a representative month. There is no evidence to suggest that it is not.
12. Based upon a "two-tailed heteroscedastic difference of means" test.
13. Court Statistics Project, *State Court Caseload Statistics,* 2005 (National Center for State Courts, 2006).
14. US Courts. "Court of Appeals." 2005. *Federal Court Management Statistics.* 15 8 2007 www.uscourts.gov/cgi-bin/cmsa2005.pl

2008 Meeting Schedule

Below are the 2008 dates of the quarterly State Bar Council meetings.

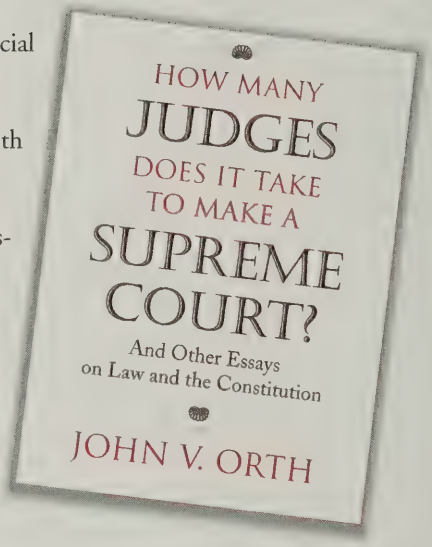
January 22 - 25	Sheraton Capital Center, Raleigh
April 22 - 25	Sheraton Capital Center, Raleigh
July 15-18	Carolina Hotel, Pinehurst
October 21 -24	Sheraton Capital Center, Raleigh
	(Election of officers October 23, 11:45 am)

How Many Judges It Takes to Make a Law—

John Orth Illuminates the History of Judicial Activism

BY GARY R. GOVERT

When it comes to energizing the base, "judicial activism" is an issue that seems to work for both the right and the left. Everybody, it seems, dislikes the other side's judges.



Long a rallying point for political conservatives, who complained bitterly about liberal judges remaking the law in their own image, charges of judicial activism have now come full circle. Since the end of the most recently completed Supreme Court term, the media have been full of op/ed columns and news analysis concerning the Court's hard right turn. The Bush Administration, these commentators say, has been ruthlessly effective in shaping an activist, conservative Court that will not hesitate to overrule—expressly or *sub silentio*—almost any liberal precedent that gets in its way. If not for Justice Anthony Kennedy's occasional spasms of moderation, the argument goes, the Court's right wing would have its way entirely.

It is tempting to dismiss griping about judicial activism, from both the right and the left, as so much sour grapes—yet another example of the side that is losing complaining about the other side not playing fair. But complaints like these are a serious matter. Charges of judicial activism imply that judges who decide matters in accordance with their political or ideological predilections, especially in the face of contrary precedent, are somehow acting inappropriately, unconstitutionally, or even immorally. The legitimacy of the court system itself is called into question.

University of North Carolina law professor John Orth's latest book, *How Many Judges Does It Take to Make a Supreme Court?* (University Press of Kansas, 2006), shines some much needed historical light on the often narrow and intensely partisan debate over judicial activism. Drawing on nearly a thousand years of English and American jurisprudence, the essays collected in *How Many Judges* not only show that judges have been making law pretty much forever—hardly a shocking revelation—but also that judges for centuries have been quite adept at husbanding their legislative power. More importantly, the essays show how the controversy over judicial activism is rooted in the collision between the common law's tradition of strong, ambitious judges and the separation of powers principles prominently enshrined in American constitutions. Add to that collision what Orth calls a "paradigm shift" in the way lawyers and judges think about the very nature of law, and the elements are in place for the fights over judicial activism that have assumed such a prominent place in contemporary politics.

"The common law began," as Orth tells it, "not with rules but with courts." English courts were created before the first parliament was summoned, at a time when the law was assumed to be part of the natural order of things, known or capable of being known by lawyers trained in the requisite reasoning skills. One of the principles of justice recognized by those early lawyers was that like cases should be decided alike, which required some kind of record to be kept. As a result, the first law reports—precursors of today's mammoth electronic libraries—began to appear in the 16th century.

These reports inevitably became sources

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Fifth Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Fifth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the story may be on any fictional topic and may be in any form*** (humorous, anecdotal, mystery, science fiction, etc.—***the subject matter need not be law related***). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. Articles should not be more than 5,000 words in length and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 25, 2008. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 25, 2008

of positive law—what Orth calls "a very special form of legislation." The early reports, however, were not always accurate or reliable. This provided an opening for creative and ambitious judges like Lord Mansfield, chief justice of King's Bench from 1756 to 1788, who frequently disregarded the reports as he went about reshaping English commercial law. In an effort to enhance their own lawmaking power, Mansfield and other innovative judges saw to it that more reliable, contemporaneously produced reports recorded their decisions. This special form of legislation became what Orth calls one of the "secret sources of judicial power."

Another was an American innovation. Prior to Chief Justice John Marshall's tenure on the United States Supreme Court, opinions typically were delivered *seriatim*—one judge after another expressing his views. Marshall, who presided over the Court at a time when its status as a co-equal branch of government was in doubt, institutionalized the practice of issuing unitary opinions. He and his successors were aware that presenting a united front tended to enhance their power, so a norm of unanimity developed—to the point that the American Bar Association's Canons of Judicial Ethics stated (until 1972) that "judges constituting a court of last resort should use effort and self restraint to promote solidarity of conclusion." Unanimity may be less normative now, but appellate courts still strive for it when they can.

Common law judges found ways to preserve their lawmaking power even as modern legislatures attempted to bring the rule of statutory law to bear on nearly every subject under the sun. Legislatures, as Orth points out, often aid and abet judicial lawmaking by enacting statutes that are so loosely drafted that they provide wide latitude for creative construction—for example, the Sherman Act, which Orth calls "little more than a legislative directive to the courts to create a comprehensive body of antitrust law." Even when a statute is tightly drafted, judges typically approach it from the point of view of prior case law, occasionally using that precedent to construe the statutory language in ways its authors never imagined.

Constitutions also get this common law treatment. This is partly because they are replete with common law terms and concepts that beg for judicial construction—"due process," for example, the meaning of which is almost entirely derived from case law. In addition, the very existence of a written constitution tends to empower the courts *vis-a-vis* the legislature. According to Blackstone, who wrote in the absence of a written constitution, "If the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." Americans, at least since *Marbury v. Madison* (1803), have seen things differently. We see our written constitutions as laws—indeed, as higher laws that take precedence over any mere statute. "At the root of the reasoning in *Marbury*," Orth writes, "lies a simple syllogism: courts interpret the law; the Constitution is a law; therefore, courts interpret the Constitution." Orth is at his descriptive and analytical best when he describes how Marshall, dealt a very weak hand in *Marbury*, deftly turned constitutional limits on the Court's jurisdiction into primary custody of the Constitution itself.

In the wake of *Marbury*, "[j]udicial review joined statutory construction and analogical reasoning in the judicial toolbox." This tool helps the courts to deter executive and legislative mischief and thereby helps to preserve the government of limited powers envisioned by the founders. But at the same time, judicial review contributes to a public perception that judges themselves are frequent violators of the Constitution's limits on government power.

Americans are taught that dividing government into three separate and independent branches safeguards liberty by preventing any one branch from becoming too powerful. Intertwined with this belief in a system of checks and balances is the popular notion that each branch of government has a separate function with respect to the legal system: the legislature makes the laws, the executive administers and enforces them, and the judiciary acts when there is a question that calls for interpretation of the law or the exercise of impartial judgment. This neat division of labor does not actually exist in the modern state—witness the myriad executive branch agencies that combine all three functions—but the ideal, and its connection to the preservation of liberty, remains a fixture in the popular imagination.

There is an obvious tension between this ideal and the common law tradition of judges making and remaking the rules of tort, contract, and property law—let alone seeming to make and remake the Constitution. Arguably contributing to this tension is what Orth calls a "paradigm shift" in the way that lawyers and judges think about the nature of law itself, especially the common law.

Until well into the 19th century, most Western legal scholars, schooled in natural law theory, viewed the common law essentially as reason woven into the fabric of the universe. "So high an authority as Sir Edward Coke was on record that 'reason is the life of the law,'" Orth writes. The role of lawyers and judges was to find and apply preexisting law according to the rule of reason. Courts might succeed or fail in that task, but the law would still be the law, even if misinterpreted or misapplied. Recalling the Supreme Court's 1842 decision in *Swift v. Tyson*, Orth notes that "Justice Story, repeating the traditional view of the nature of the common law, actually denied that the rules declared by the courts were 'laws' in the usual sense of that word: 'In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.'"

But as Orth points out, "While well grounded in history, Story's view was already losing its hold even as he spoke." Within a few decades, Oliver Wendell Holmes, directly contradicting both Coke and Story, would say "[t]he life of the law has not been reason: it has been experience," and "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." The common law was no longer seen as reason woven into the fabric of the universe, but as a product of the minds of lawyers, judges, and indeed anyone attempting to divine what a court might do—or ought to do—with a particular set of facts. Orth points to Harvard professor John Chipman Gray, who at the beginning of the 20th century "ridiculed the notion of a sort of latent law only awaiting discovery by the judges when he asked: 'What was the law in the time of Richard Coeur de Lion on the liability of a telegraph company to the persons to whom a message is sent?'"

How Many Judges is peppered with illustrations of the paradigm shift and its effect

on both individual cases and the general development of English and American law. A certain ambivalence about the paradigm shift suffuses the book, however, and is perhaps most evident in the title essay. When asking how many judges it takes to make a Supreme Court, Orth anticipates that whatever number bubbles up in the reader's mind, it is likely to be odd, not even. Hardly anybody wants the game to end in a tie. But this response, he demonstrates, is predicated on some distinctively modern assumptions.

"If an odd number of judges is so obviously desirable," Orth writes, "it is curious (one is tempted to say odd) that the premier common-law courts, the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer, operated for so many centuries with four judges each." Closer to home, the original number of justices on the United States Supreme Court, as provided in the Judiciary Act of 1789, was six. Congress changed the number of justices on the Court frequently during the nation's first century—several times in an effort to either grant or deny a particular president an appointment—but seemingly without a great deal of concern over whether the number was odd or even. It wasn't until 1869 that the number stabilized at nine (although there had been nine, because there were nine federal circuits, from 1837 to 1863). In England, it was not until about 1875 that the appellate courts were regularly composed of an odd number of judges.

"The felt need for an odd number, so that a 'tiebreaker' would always be available, suggests a changed perception of law, at least at the level of a court of last resort," Orth writes, "a perception that law, like electoral politics, is a matter of votes, not a matter of fact on which well-trained jurists would most often agree."

Judges who think of the law as reason-based or divinely ordained may or may not be less likely to depart from precedent—less likely to be "judicial activists"—than those who take the more modern view. But no matter how judges' personal or political views actually affect their judging, a public perception that such opinions are likely to be outcome-determinative in controversial cases is potentially problematic. This is particularly true when (as seems to be the case at least in America) the non-lawyer segment of the population still largely conceives of law in the more traditional way and still understands separation of powers to imply limitations on the lawmaking function of the courts.

There can be little doubt that many members of the public—not to mention politicians at all levels of the executive and legislative branches—currently view what goes on in appellate courts as what Orth calls "the continuation of politics by other means." Judicial confirmation hearings, to cite just one example, are conducted as if the federal appellate courts, and the Supreme Court in particular, should be expected to function as annexes to the Oval Office (albeit somewhat untrustworthy ones). The question is what, if anything, to do about this.

The answer from the political right typically involves reversing the paradigm shift, at least to some degree, and restraining the influence of ideology through textualism, originalism, or the attainment of Olympian objectivity—as when Chief Justice Roberts, at his confirmation hearing, compared the job he was seeking to that of a baseball umpire. Those on the left deride any such pretense of objectivity. "In deciding whether diversity in the classroom is a compelling governmental interest, how can a judge's own views and experience not matter?" Duke law professor Erwin Chemerinsky asked in a recent issue of the *Boston University Law Review*. "In deciding whether recounting ballots in the Florida presidential election violated equal protection, does anyone believe that the five-four decision was not composed along ideological lines?" Even as non-left an authority as Judge Richard Posner, writing in the same journal, described Roberts' remark as "tongue-in-cheek" and "especially unconvincing."

Posner, a Reagan appointee to the federal appellate bench, thinks judges should take themselves less seriously and be more conscious that their decisions "are rarely the product of an analytical process that can be evaluated in terms of truth or falsity, or right or wrong." Such an attitude, he believes, might make them more hesitant to thwart the legislative will in the name of the Constitution—less likely, in other words, to be what the public perceives as judicial activists. Chemerinsky, for his part, wants to expose all theories of neutral, value-free decision making as fundamentally fraudulent. He advocates simply accepting that court decisions on important constitutional issues will always turn largely on the presiding judges' political ideologies and appears not to be worried that public perceptions of judicial activism will threaten the legitimacy of the courts. Such a concern, he writes, "grossly underestimates the public."

Perhaps. But ours is increasingly a world in which public policy and law are influenced, and can be almost instantly transformed, by the latest barrage of information, misinformation, and disinformation. In such an environment, it may be more important than ever to protect and preserve the courts' ability to restrain the constitutional mistakes and excesses of the legislative and executive branches. If lawyers and judges overestimate the public's tolerance for what it perceives to be judicial activism, the courts may eventually lose the moral authority to perform this essential function. ■

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What is Going on Here?

BY G. STEVENSON CRIHFIELD

There is a saying that the more things change the more they stay the same. Put another way, maybe some things never change.

I have been involved in the grievance process both at the judicial district level and the State Bar level for a good many years, and I am also involved with the Attorney/Client Assistance Program (ACAP) of the State Bar. These activities involve questions regarding lawyers' conduct and the way they practice law.

Not all lawyers' actions are sanctionable when they occur on an isolated basis, but can become sanctionable and subject to discipline when they become chronic and repetitive. Examples, for purposes of this article, are in Rule 1.3 regarding diligence and Rule 1.4 regarding communication. We have all heard ourselves and others say that the State Bar gets upset when I don't return my clients' phone calls. Of course that's not true until and unless it reaches the level of being so much a part of your practice profile that clients are properly upset.

Rule 1.3 refers to reasonable promptness in representing clients and points out that procrastination is widely resented. This is true even though the client's case may not be harmed in some way. Also, the lawyer is advised under the comments section to control their workload in a way that avoids shortchanging clients along the way. Paragraph 1.4 regarding communication tells us that we are supposed to promptly inform the client regarding their case and to keep the client reasonably informed about the status of the matter.

Even though the lack of promptness on an occasional basis is rarely the cause for professional discipline, when a lawyer chronically engages in violations of Rule 1.3, it is a proper subject for discipline. Likewise, a failure to communicate with clients (put another way, return their phone calls) on a chronic basis can result in discipline.

Another area that is a constant source of problems, and resulted in the implementation of the fee dispute program at the State Bar level, is the charging and collecting of legal fees under Rule 1.5. In regard to fees, it is improper for a lawyer to charge a clearly excessive fee and we should remember that there are seven bases for judging whether a fee is excessive. Lawyers should have a written fee agreement in every case unless it is the most uncomplicated of legal matters. To do otherwise asks for difficulties. It is also necessary for the lawyer to clearly distinguish between a deposit against fees to be earned and a true retainer. We see numerous written agreements that are ambiguous at best and incorrect at worst. This leads to unhappy relationships between lawyers and their clients and results in the grievance process and the fee dispute resolution system being implemented.

Fee disputes often arise out of misunderstandings and failure to advise the client about costs of litigation in certain situations and to not fully explain what the costs are of pursuing a certain legal strategy.

The vast majority of calls to the ACAP revolve around these kinds of issues. Typically the State Bar receives about 20,000 calls a year from clients complaining about lack of communication, lack of efficiency and promptness in handling cases including procrastination, failure to communicate, and fee disputes. In the second quarter of 2007 there were 167 requests for fee dispute resolutions.

Something that aroused my curiosity are statistics from a book regarding the English legal profession from 1800 to 1988. English solicitors are generally comparable to members of the American Bar. What do you think the clients in England complained about? They include delay, inefficiency, cost, lack of information and communication, overcharging, creating work for themselves (churning), and what I will call poor personal relations including lack of consideration, unfriendly attitudes, and discourtesy.

Why do lawyers engage in activities that lead to these kinds of complaints? Is it the kind of work we do or the kind of people we are?

One reason may be the poor job we do educating clients about how the system works, how much it's going to cost, and what the client can anticipate including the amount of communication from the lawyer. Being involved in domestic relations work, I have found that clients will call and ask questions about how things are going when they aren't. This is a function in some instances of the way the legal system works. If we did a better job of educating our clients about what is likely to occur, they might be more accepting of the situation in which they find themselves.

An issue that is sometimes overlooked is the fact that people prefer to spend their money for things that give them pleasure rather than pain. Being involved in the legal system is usually painful for a client. The client is particularly distressed that he has to pay someone to help him in a painful situation. As a result, the client can become very

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The Great Grayson County Bar Third of July Picnic and Softball Extravaganza

By Ken Campbell

The Results Are In!

In 2007 the Publications Committee of the State Bar sponsored its Fifth Annual Fiction Writing Competition. Ten submissions were received and judged by a panel of six committee members. A submission that earned third prize is published in this edition of the *Journal*. The second and first place stories will appear in the next two editions of the *Journal*, respectively.

Dawn broke heavy o'er Grayson County that fateful day. The steel-gray skies bode naught but ill for the festivities and for me.

I know, that was a bit melodramatic, but the day was very important for me. It was the 40th anniversary of Grayson County Bar's annual July third picnic and softball game. I'd finally reached my year to supervise the event; a rarely-offered rite of passage for young Grayson County lawyers.

Eyeing the dreary morning through my bedroom window, I could barely force myself to rise on one elbow. *"This can't be,"* I thought, *"not on my watch."*

Warily I reached for the remote on the bedside table and aimed it at the TV. As the low rumble of distant thunder gently shook the room, I feared the worst.

When the television jumped to life, a local forecaster was mid-spiel. I held my breath as she pointed to various squiggles superimposed on the map behind her.

Halleluiah! The storm would bypass us to the north and soak someone else. I took a second to thank the Lord and ask Him to please spare my northern neighbors any serious flooding.

In much better spirits, I jumped from the bed and dressed. Ordinarily I would have worn a proper softball uniform, but not that day. That day I was management. There was a cookout to coordinate, not to mention events for the kiddies and the ever-important softball game. I needed to wear my best khaki shorts and oxford-blue button-down shirt. Boat shoes of course, no socks.

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I should mention a few things about Grayson County. We're in an oft-forgot eastern part of North Carolina, about three counties away from any major city. County seat Buffington, population about 2500, is also our largest city. That's where I live and practice law.

Buffington was named for a Revolutionary War hero, but he wasn't your run-of-the-mill Patriot. He was actually British Colonel Wearin Buffing, an officer credited with several key losses that secured Eastern North Carolina as a patriot stronghold.

Evidently, Colonel Buffing got his commission the old-fashioned way; through patronage. In England, the Buffing family was well regarded and quite wealthy, with considerable land holdings in the Carolinas. When the king issued a call to arms for the Buffing family to aid the war effort, Wearin was the only son to step forward. Or maybe I should say he was shoved forward. Seems the rest of the sons were pretty well tied up tending to whatever they had to tend to at home.

Wearin was a young bachelor with no children, so his married brothers and cousins considered him the obvious choice to defend the crown in the colonies. He was also the least aggressive of the lot and put up little resistance to going. The family's largesse to the king's war coffers more than compensated for Wearin's lack of military experience.

At first, Wearin resented his "banishment" to North Carolina. He was sent to Grayson County where the family had its major landholdings. His troops overran the county easily enough—most of Grayson County's militia was fighting at King's Mountain, near Charlotte—but after that, Wearin didn't have his heart in the fight. Finding the locals to be a likeable lot, he wished them no ill will. In fact, he found Grayson County a rather pleasant place to stay.

To keep the king happy, Wearin made occasional token sorties into neighboring counties. His troops rapidly gained a reputation for arriving with advance warning, downing a few ales with the locals, and going back home within a day or two. However, Wearin's reports to the crown were full of glowing praise for his men's valor in the face of withering enemy resistance.

After the war, Wearin announced that he wished to become a North Carolinian himself. Local politicians arranged amnesty for him and he soon started a farm on the family holdings. He was far more successful at farming than fighting and as the estate prospered, a small town grew around it, eventually becoming Buffing Towne, now our fair city of Buffington.

By the way, I am Harold Buffing, a direct descendent of the colonel, and I am no more aggressive than he was. I suppose that's why I

practice mostly in real estate and probate, trying to stay out of the courtroom. The old Buffing estate still stands and I am now the proud owner of that drafty money pit.

Unfortunately, the Buffing name doesn't curry the favor it once did in these parts. I have had to make my own way and that day in July was part of the making.

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I would say that Grayson County was one of those fabled places that time forgot but for one thing: Congressman McElvaney. A county native, Old Congressman Mac remained a Washington, DC, fixture for so long that they'd named a federal building for him. Oh, maybe not as prestigious as the Rayburn building, but still pretty impressive. I believe it houses a subdivision of the Federal Bureau of Weights and Measures or something like that.

The primary reason Congressman Mac stayed in office forever was his extraordinary effectiveness at bringing home the pork. For such a sparsely populated county, Grayson always has been blessed with just about everything it needs, state of the art. It's even had several things it doesn't need, state of the art.

Our courthouse could host court sessions for four surrounding counties as well as our own. The CSI units at our sheriff's office and police departments make the Raleigh folks drool. The district attorney and his staff enjoy office suites as fine as any you'd find at a private Raleigh law firm. All of this, of course, has been vital to our nation's welfare for one reason or the other.

Congressman Mac was an attorney himself, at least by title. He hadn't practiced since he first set foot in Washington but he was principal rainmaker for McElvaney Pritchard & Associates. Since Pritchard met his reward in '78 and McElvaney was a partner in name only, the "& Associates" did all the work. Naturally, there was a fair amount of turnover in associates.

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Our county bar was a fairly small, tight bunch, much like an extended family; a very dysfunctional family but a family nevertheless. Every July, the private-practice side of that family was called upon to man the "Angels" softball team. The Angels were always sponsored by the McElvaney Pritchard firm and were Congressman Mac's pride and joy. They hadn't lost a game in 39 years.

The Grayson County District Attorney's office, usually rounded out by local law enforcement officers, was always the opposing team—the "Devils." Much like basketball teams who played the Harlem Globe Trotters, the Devils knew they were expected to put on a good show and gracefully lose. After all, the DA and local law enforcement knew who brought the pork home. It wasn't that bad a concession, all things considered.

Team rosters were rotated from year to year so everybody had a chance to play. (A few cynics said it allowed off-year lawyers to actually enjoy the Independence Day holiday.) Congressman Mac didn't play of course, but he always watched from shaded reserved seats behind the Angels dugout. Did I mention the softball field was state of the art? Anyway, July Fourth week and Christmas were about the only times Congressman Mac made it home to Grayson County and he enjoyed the game immensely.

Most years a select committee of seasoned county bar members chose one of their own to organize the day's events, but every five years or so they'd defer to a rising member of the bar. Having been in practice for only four and a half years, I was the newest member of the bar and still rising, so it was my turn.

Organizing the Third was a plum for young Grayson County lawyers because it put them in the spotlight for Congressman Mac, who might then include them when his office had excess work to sprinkle around. He was old-fashioned like that, never forgetting that older attorneys took him under their wings and referred clients to him when he first struggled to build a practice.

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So this was my day to bask in the spotlight. I had everything planned with military-style precision and everything would be extra special. For example, I rented a huge inflatable castle-shaped slide from Buffington Amusements, which no one had done before. I just had time to meet the delivery truck if I hurried to McElvaney Park.

Sure enough, the truck arrived only a few minutes after I did. I showed the driver where to deliver the castle and its air blower, not far from the ball field itself so parents could keep an eye on the kids and the game at the same time.

There was one small hitch in the delivery; somebody forgot to include hold-down stakes. The driver said, "It's heavy enough to stay put without 'em, but I'll try to swing by with a few after my next delivery." Thus reassured, I asked the driver to inflate the magical castle and I headed for the picnic area.

I'd arranged for my secretary, Delilah Puryear, to oversee the cookout. Delilah was a roundish little redhead who kept my office running with machine-like precision. She arrived at nine on the button and I met her in front of the charcoal grills. I told her the hot dogs had to be done in time for the seventh-inning stretch, which lasted long enough for everyone to enjoy the picnic. Congressman Mac always supplied the hot dogs, buns, and condiments. Members of the private bar and DA's office and their staffs brought everything else. Law enforcement folks didn't have to bring anything; it was our treat.

Traditionally everybody showed up willy-nilly with the side dishes. Amazingly, people brought a good variety most years, including the usual chips, beans, salads, deserts, and so forth. But last year we had some duplication so I decided to assign dishes to assure a perfect balance. I gave the list to my receptionist, Carla Blackacre, so she could call everyone and tell them what to bring.

Having given Delilah precise instructions on when and how to cook the hot dogs and where to place the side dishes, I hurried over to the ball field to be sure all was well there. On the way, I glanced at the foreboding skies. Not a drop of rain had fallen yet and the clouds seemed to be heading northeasterly. To the southwest the sun shone brightly. In spite of faint rumblings to the north, I felt pretty secure.

The ball field was in perfect condition and the dugouts were stocked with plenty of water and snacks.

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As a special treat for the smaller kids that year, I hired Blinky the Magical Clown. I'd never seen him perform, but one of my boys told me how Blinky kept the kids at a friend's birthday party in stitches for hours. I knew the parents at the picnic would appreciate that. Carla made the arrangements for me.

Blinky wasn't due to arrive until ten. According to Carla, all Blinky needed was a quiet corner with a small table and stool. Having chosen a grassy spot within sight of the ball field, I fetched the card table and

kitchen stool I'd loaded into my van the night before and took them to the performance area. When I set up the table and stool, I noticed the lack of shade in that part of the park and wished I'd ordered some sort of open tent or something.

Next stop was the volleyball nets for the teenagers. The nets were up just like they should be, but all I could find in the ball locker next to the court were two half-inflated volleyballs and a flat basketball. I made a mental note to contact the resident athletic director.

About this time, I saw the Buffington Amusements driver unfolding the inflatable castle on the far side of the ball field so I ran over to see what I could do. He was tugging at a corner asking, "Which way you want the stairs to face, Bud?"

I hadn't given much thought to orientation of the device so I told him, "Whatever you think best." He stepped back, looked at the field, looked at the sky, looked like he was making some sort of mental calculation, and then left it where he'd dropped it.

I helped the driver finish unfolding the castle after which he dragged the blower over and hooked it to the inflator hose. Soon the flat rectangle began sprouting turrets and stairs and eventually grew to be a full four-walled castle. An arched doorway opened through one wall and the opposite one was adorned by a bouncy outside staircase. At the top of the turret-flanked staircase, kids could hop onto a steep inflated slide and zip down to a huge interior cushion.

The driver gave me some instructions on keeping the edifice inflated and jumped into his truck. I asked him about the ropes coming out from under the castle and reminded him of the promised hold-down stakes. The truck made too much noise for me to hear his response, but he smiled and waved, so I took that as a good sign.

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By the time everything was set up it was nearing noon. I wasn't sure where the time had gone. I did know that the term "time flies when you're having fun" did not apply in this instance. Guests were already arriving, the first few having parked themselves every which way near the ball field. That's when I remembered that the local Boy Scouts always helped with car parking, a detail I forgot to note on the careful checklist I'd compiled months before. I lamented that maybe I should have taken a few minutes to go over the list with one of the veteran planners, but I was afraid they'd think less of me if I couldn't figure out how to put together a simple picnic and ball game.

I reasoned that these folks were responsible adults who could figure out a sensible parking pattern. Besides, the law officers were used to traffic control and surely they'd work it out. I felt better.

I was about to fix a few things I'd made mental notes of when I spied Congressman Mac's Cadillac. Mrs. McElvaney was at the wheel as always. The congressman always used a chauffeur in the capitol and he'd practically forgotten how to drive. I noticed Mrs. Mac driving haltingly and realized she probably needed someone to guide her to a parking spot. By this time the parking lot was a complete mess.

I jogged to the front of the Cadillac and caught Mrs. Mac's eye and then personally led her to a spot very close to the McElvaney Pritchard dugout. She got out, handed me a quarter, and said, "Thank you so much dear. Are you the troop leader? All your little ones must be off with their families this year." At a speed I found surprising for an 80-year-old woman, she was on Congressman Mac's side of the car helping him find his way to their special seats behind the dugout.

I pocketed the quarter and looked toward the picnic area. Delilah definitely needed my assistance with the bowls people had piled helter-skelter on the tables. But before I could take the first step toward the picnic area, I noticed with horror that a deputy's wife and son were occupying the McElvaney seats behind the dugout, the only seats with backs and cushions built in. Mrs. Mac was still busy helping the congressman make his way toward the dugout, so I rushed over to intervene. The mother was more than willing to move, but sonny wouldn't hear of it and started to let out a yawl. I fished the shiny quarter out of my pocket and laid it on the bench about four rows back and junior went for it. His mama got up to join him just as the McElvaneys reached their seats and settled in.

Next I hightailed it to the picnic area where Delilah stood pulling at her hair. I asked her what was wrong and she pointed to a retreating Great Dane saying, "He, he, he..."

Before I could ask for further elaboration, I saw that the dog had several packs of hot dogs in his maw. Several more empty packs littered the ground around the grills. Knowing how easily Delilah gets upset, I very gently asked her, "Why didn't you stop him?" Instead of an answer I got a flood of tears. Delilah gulped out something and I repeated what I thought I heard, "Frosting and smiling?" A nearby teenager elucidated, "She said the dog was frothing and snarling." He muttered something else too low for me to make out.

As soon as I could calm Delilah, I extracted a wad of bills from my pocket and stuffed it into her hand saying, "Get to the store quick and buy some more." When she looked at her hand kind of cross-eyed, I realized she was holding a wad of Monopoly money. I wasn't sure how that got into my pocket, but I made a mental note to have a talk with my sons. I fished out the real money and shooed her toward her car. She took two steps and the flood resumed. She turned back to me and sobbed, "Everybody's parked every way from Sunday and my car's hemmed in."

Since my car was safely parked on the other side of the ball field, I fished out my

keys and told her, "It's all right, take mine. If you hurry, there's still time to get the hot dogs cooked by the seventh inning. Take the back park exit."

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Looking at my watch, I realized the game should start soon and decided I'd better check on Blinky. Seeing a herd of kids around the area where I'd left the card table, I assumed Blinky was already entertaining them with witty prestidigitations. I assumed wrong.

Blinky was lying on the ground comatose while the kids ransacked his bag of tricks. I rushed to Blinky's side, figuring he must have suffered heat exhaustion from wearing that heavy costume in the hot sun.

Sliding a hand under Blinky's neck, I lifted his head and began to unbutton his vest and shirt to cool him off. That's when I realized Blinky was not a he but a she. She popped her eyes open and said, "Hey babe, we on a date?" I nearly took drunk from the alcohol fumes on her breath.

I hissed, "Blinky, have you been drinking already this morning?"

She answered, "Heck no, I been entertaining an all-night lodge party. Just got here." Spying some kids removing a few peculiar items from her bag of tricks, Blinky staggered to her feet muttering something about "party favors, wrong bag." She grabbed the sack from two confused-looking boys and wandered off to find her car.

I stood speechless, wondering how to keep all these kids entertained. Then I remembered the magic castle and scooted them all in that direction. I didn't have time to see if anyone was supervising the castle; I had to get the ball game organized.

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Arriving at the ball field nearly out of breath, I noted with relief that the teams had aligned themselves in their dugouts, ready to play. About that time I heard distant sirens. An assistant DA, his face an odd shade of purple, approached me and said, "There's a huge pileup near the park entrance. Traffic's backed up 'cause people can't find a parking space and it looks like a bunch of the deputies'll be tied up for a few hours untangling the mess. Now we're short a player."

I was about to suggest how they could round out their team when Congressman Mac shuffled up to me and said, "You go ahead and play for the Devils." I started to protest that there was too much for me to oversee, but he would not hear it, muttering something about "preventing more problems."

I protested further that it wouldn't be fair to my fellow barristers to take the other side but the Angels team insisted that I do the right thing and help the DA fill his roster. Apparently some of the Devils agreed with me that this would be an unfair arrangement because they began to protest, but Congressman Mac had only to raise his hand and they stopped.

As I headed for the Devils dugout, I looked in vain for the return of my car and Delilah with the hot dogs. At least the castle slide was a big hit; I could see a horde of kids milling around waiting for their turn to use it. I realized that I'd never had the chance to talk to the recreation director about the missing volleyballs.

By about the fourth inning it looked like everything was going to turn out OK after all. From my post in left field I could assess various activities. I saw Delilah return with the hot dogs and some of the teenagers helped her stoke the charcoals. The flames looked a bit high but I attributed that to the larger grills here at the park. Besides, I was glad the teens found something constructive to do since they couldn't play volleyball.

Turning my attention to the castle, I noticed that most of the kids were actually congregated around the outside watching something. My heart nearly stopped as I saw a boy do a handstand on the upper-most turret, and then flip onto the slide. Soon another boy duplicated this feat, adding a few more daring moves. I was aghast and impressed at the same time.

At the top of the seventh inning I managed to steal away to the picnic area and check on Delilah's progress. When I arrived, Delilah was in tears yet again, her cheeks nearly as red as her hair. The teens, who had taken over the cooking, were competing to see who could blacken the hot dogs best. I told Delilah to get hold of herself and come with me to uncover and organize the various side dishes. Getting them all uncovered proved to be rather dismaying. Every bowl contained either cole slaw or baked beans.

I asked Delilah, "How in the world did this happen? I gave Carla explicit instructions on who was to bring what."

Between sobs she replied, "Carla lost your list. She knew who she was supposed to call, but not what they should bring and then she kept forgetting what she told the last person to bring so she just kept repeating herself."

At least organizing the side dishes wouldn't take as long as I'd feared.

I noticed that the wind had picked up a bit and I was glad there would be a cool breeze for the picnic. Looking up, I marveled at how we seemed to be nearly under the dividing line between bright sunshine and menacing storm clouds.

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Soon the umpire called time-out and hungry folk streamed from dugouts and bleachers. I thought it best to let Delilah wrangle the thundering hordes and sped over to the castle to direct kiddies to the food.

At the castle, I learned that the daredevil gymnasts were neighborhood kids showing off. After hearing something about bets being made, I reminded the kids that gambling was illegal as I herded them toward the picnic area. From my vantage point at the castle, it appeared that Delilah had things well under control, so I stayed put.

Soon I noticed Delilah kind of curled up on a bench and, deciding she might appreciate a little help, I moseyed over to the picnic area to see what I could do. About the time I got there the umpire hollered, "Sky's too iffy, we need to cut the stretch short and finish the game." Everyone cheered and rushed back to the bleachers and dugouts.

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The Devils had shown admirable restraint throughout the game, always staying just a run or two behind the Angels. By the bottom of the ninth the Angels were ahead by three but the Devils managed to get the bases loaded. And it was my turn at bat.

As they'd done all day, the outfielders moved in closer when I came to bat. As I stepped up to the plate, I glanced toward the castle. The daredevils were at it again. This time one of them was doing a swan dive directly from the turret onto the slide. Delilah was trying to stop them to no avail. I didn't have time to do anything; I had to concentrate on the pitcher.

Just standing there watching the strikes fly by me didn't seem too sporting. I planned to

pop a high fly that would be easy for a fielder to catch before too many runs came in. Taking my stance, I waggled the bat a few times waiting for the pitch. Then fate intervened.

I don't know if you're familiar with windshear, but I learned what it is that day. As soon as the ball left the pitcher's hand my mind must have shifted into high gear because everything seemed to go into slow motion. The ball was perfectly centered over the plate and I took an easy swing. It popped up as I wanted it to, but then things took an eerie turn.

From somewhere within the divide of gray skies and blue, a swirling stream of air had been building on itself, gaining strength and intensity until it burst groundward as my ball went skyward. Air stream and ball met, decided they liked each other, and took off together. The ball spiraled crazily upward for a few seconds. Confused outfielders and infielders, looking up as they scrambled for the ball, collided with each other.

The ball dropped a few feet and suddenly darted upward toward the centerfield fence. Momentarily stunned, the Devils on base just stood there. Suddenly their instincts kicked in and they started running. I guess the adrenaline rush was too much for me because I forgot I was supposed to help the Devils lose and started my own mad dash around the field. As I rounded second, I could hear some of the Angels holler something quite unangelic, but by then I was too distracted to pay heed.

My distraction was the castle, floating several feet above the ground, presumably on the same wind that carried my ball aloft. One of the daredevils teetered on the edge of a turret but soon disappeared into the bowels of the floating structure. Apparently Delilah had tried to stop the castle's ascent, because she was hanging on to a rope, being dragged across the grass. Eventually she let go and flopped to the ground, where she lay watching the castle float away. Fascinated and horrified as I was by this turn of events, I couldn't stop running. I kept my eye on the spectacle in the sky as I rounded third. In fact, by this time nearly all eyes were on the spectacle.

Having been torn from its air supply the castle slowly deflated and gently drifted back to earth, albeit on a rather oblique path toward the parking lot. It deflated completely as it landed atop a car, and there was the daredevil staring at us from atop the congressman's castle-draped Cadillac.

As all this transpired I hurried toward home plate. My pop fly had landed just inside the center field fence. An outfielder who was still standing scrambled after it and threw it toward home.

As I raced toward home I looked directly in front of me for the first time. The Angels' catcher stood in the middle of the plate, mitt outstretched. Forgetting I hadn't worn athletic shoes, I tried to slow my forward momentum, only to trip over my own feet. Not many people saw what happened next, mostly the catcher, the umpire, and old Congressman Mac and his wife—who'd been watching intently for the outcome of the game. Most everybody else still stared at the deflated castle draped over the congressman's car.

According to the ump, I did a double summersault rivaling anything in Olympic competition. As the ball whizzed over me toward the catcher, I slid toward home plate head first with my hand inadvertently outstretched. Just before the ball hit his mitt, my fingers touched home plate. The umpire yelled "safe" and the Devils won their first game in 40 years. I think I heard a stunned DA say, "The prosecution rests," but I could be mistaken.

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Some say Congressman Mac thought I had real guts to defy him and win the game. Some say he probably thought I needed a keeper. They were all trying to comprehend why he asked me to become a partner a week after the game. After the congressman died last year, Mrs. Mac herself confided that she talked him into it. She thought I should be rewarded for providing the most entertaining July Third they'd had in 40 years.

That was the last year of the Great Grayson County Bar Third of July Picnic and Softball Extravaganza. Can't say who it was, but somebody convinced the congressman that the players might rather spend the holiday with their families, and he agreed. We play a few times during the summer now and don't worry about who wins and who loses.

Oh, Delilah's fine. I gave her a couple of weeks off to rest and she came with me to the new McElvaney Buffing law firm. She's my chief legal assistant now. ■

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What is Going on Here (cont.)

resentful, at least subliminally, over the way the client's life is affected by the legal system. Lawyers would be wise to cultivate good human relationships with their clients so that no client believes that the lawyer's conduct and attitude is exacerbating the client's frustration and pain.

In 1954, Prentice Hall did a survey in the state of Missouri. This was the first survey ever done regarding lawyers. Laymen listed the following factors as contributing to satisfaction with their lawyers: friendliness, promptness, courteousness, not being condescending, and keeping the client informed. The most negative factors listed included exhibiting a superior, bored, or indifferent attitude; being impatient or impersonal; failing to inform the client; and being rude or brusk. I admit that lawyers who are overworked or under stress could easily exhibit a number of those tendencies or attitudes. But for the good of the profession, as well as the individual lawyer, we need to be more attentive to avoid these situations because if we exhibit a positive attitude toward our client, the client is more likely to overlook what they believe is unnecessary delay or other factors which might be violations of the Rules of Professional Conduct.

In any event, I hope that the members of the Bar will consider these issues carefully and try to take steps through our CLE programs, our Inns of Court, and Bar Associations to do a better job dealing with these problems. ■

Steve Crihfield is a State Bar Councilor and member of the State Bar's Publications Committee.

An Interview with Our New President—Irvin W. Hankins III

Q: What can you tell us about your roots?

I am a native of Charlotte. My mother's family on all sides has been in Mecklenburg County since the time of the Revolutionary War. My father was born and raised in Forsyth County. My wife, Bobbie, was born and raised in Lenoir County, which was home for both of her parents. I was educated in the Charlotte public schools, and went to both undergraduate school and law school in Chapel Hill. My wife, my oldest daughter, and my son-in-law are also UNC graduates, along with numerous other family members. I am proud to be a native son of the Old North State, and as you can see, am a Tar Heel born and bred.

As a young person, I spent a lot of time with my grandparents, aunts, uncles, and cousins. Family has always been important to me. My mother was a calm example of complete reliability. My father was an infantry officer in World War II. He believed in hard work and was a tough task master. I learned a great deal from him. He was in the funeral business in Charlotte. While working for my dad during high school and in the summers, I learned that service to one's client is essential. He would not accept procrastination or inattentiveness to detail and expected you to be accountable. At the same time, he stood behind you, whatever happened, when things went bad. I was fortunate to have good role models for parents.

As a junior and senior high school student, I was devoted to football. I had good coaches and learned the value of teamwork, preparation, and commitment. I think very fondly of my time on the gridiron.

After college and before law school, I served in the navy. That was a very valuable learning experience for me. Much of what I know about management, leadership, and organizational concepts, I learned in the navy.

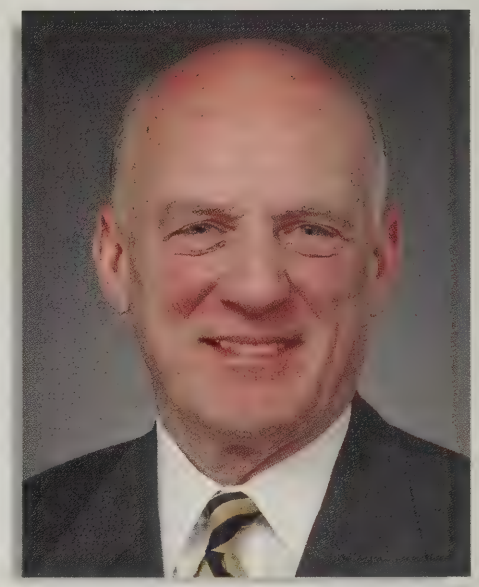
As a young lawyer, I worked directly for two great mentors, Bill Poe and Joe Grier. They were true professionals and excellent attorneys, and I have always strived to conduct myself as a lawyer as they did.

Q: When and how did you decide to become a lawyer?

As a young person, I admired the lawyers in our community and the contributions made by historical figures who were lawyers. I began to think about law school in high school, but I did not make a final decision to go to law school until my last year in the navy. I was in the navy for four years between undergraduate school and law school. My resignation from the navy was effective in June 1972, and I entered law school in August 1972.

Q: What is your practice like now and how did it evolve?

Currently my practice is focused on civil litigation. I have handled litigation for Duke Energy since I started practicing with Parker Poe in 1975, and I am our firm's Duke Energy relationship partner. I am presently also handling accountant malpractice cases and various other commercial litigation. Since 2002, my last year as managing partner of Parker Poe, I have served as its general counsel and in that role, I provide advice and counsel to the firm and its attorneys. When I began practicing in 1975, our firm had 15 attorneys, and most of us were engaged in a general civil practice. I did a little bit of everything in the beginning. Over time as the firm grew, we gradually specialized and organized the firm into substantive practice groups. I am a member of our Litigation Department. From 1986 until 2002 I also served as Parker Poe's managing partner and for about 20 years on its Management Committee or Board of Directors, as it is now called.



Q: If you had not chosen to become a lawyer, what do you think you would have done for a living?

My first duty assignment in the navy was as gunnery and fire control officer on the USS Manley (DD-940). I then went to the USS Courtney (DE-1021) as weapons officer, followed by a short term as chief engineer, and then operations officer. At the time I resigned, I had been accepted for navy post graduate school and destroyer school. My ships were deployed and at sea for most of my four years of active duty, and I thought we were engaged in valuable and exciting work. I enjoyed my service in the navy and seriously considered a career as a naval officer.

Q: How and why did you become involved in State Bar work?

In 1996, my friend Jerry Parnell asked me to run for the one year remaining on Bob Sink's unexpired term as a councilor for Mecklenburg County. Bob had just been selected as the State Bar Vice-President. My friend and partner, Jim Preston, had been on the council and served as its president in the

1980's, and I knew from him that it was a good and valuable experience. With the support of Jerry, Bob, and Jim, and other friends, I was elected. I have learned much, gotten to know some extremely fine people, and enjoyed the experience more than I ever anticipated.

Q: What has your experience on the Bar Council been like and how has it differed from what you anticipated?

When I began my service on the council, I had no idea that it would continue for over ten years. I also had not focused on the significant tasks ahead for the Bar arising out of growth, complexity, and change in the practice of law. Many difficult issues have arisen that were unexpected. In the process, I have learned much about our profession and the responsibilities we have to the public as attorneys.

Q: Can you tell us about the most difficult issue you've faced while serving on the council?

The most difficult issue which I have faced while on the council was whether to grant reinstatement for attorneys who had been disbarred. I can recall two of these situations, and in each case, it was extremely hard to decide what to do.

Q: You live in North Carolina's largest city and practice with a large firm. Do you think you can understand and empathize with those lawyers who live and work in the vast rural areas of the state?

Yes, I do. To begin with, our firm was not always large. When I began with our firm as a summer clerk, it had only 12 lawyers and, in many respects, was then a confederation of single practitioners all engaged in a general practice. Beginning at that point, I have experienced all of the pains of growth and change. In addition, my wife is from Pink Hill in the east, a small town of 500 people. Through 37 years of marriage, I have been in close contact with the small town environment of Pink Hill. My wife's parents and her two sisters are still there. Her first cousin, George Jenkins, is a single practitioner and a Bar Councilor from Lenoir County. Her brother, Billy Brewer, is a single practitioner in Raleigh. I have many close friends in small firms across the state. I believe that the North Carolina Bar is a collegial group from Murphy to Manteo, and I feel a connection with all of it.

Q: In your opinion, does it make sense for lawyers to be regulating themselves? Is it good public policy? Do we deserve the public's trust?

Yes. Lawyers are in the best position of anyone to regulate other lawyers. The practice of law is unique and requires a special sense of duty. Lawyers are human and must be subject to regulation and discipline to protect the public and to maintain the public's trust. The majority of lawyers uphold that trust without fail for the whole of their careers. These lawyers have a special reason to be sure that others in their profession do not cause the profession to be tarnished by improper conduct. It has been my experience that lawyers take that responsibility of self-regulation and discipline very seriously, seeking to be fair and to protect the public. The legal profession as a whole is more serious about its ethical rules and the enforcement of those rules than any other profession about which I am aware. The public can be confident that its trust is fully justified by the commitment of the legal profession to live by its covenant of trust with the public, the Rules of Professional Conduct.

Q: What about the disciplinary system? Are we doing a good job? Where can we improve?

I believe our disciplinary system is working well. We have an extremely able staff which works hard to address complaints and process grievances in a timely manner. We will be adding additional staff and new equipment in the near future to assist with the workload. We need to work harder to deal with grievances as quickly as the circumstances permit and to achieve reasonable consistency in the discipline imposed.

Q: You had a chance to observe closely the State Bar's recent disciplinary action against the former district attorney from Durham County. What were your impressions?

The Duke lacrosse case was unusual. We are seldom required to deal with a situation about which there is so much publicity. The grievance arose out of a high profile criminal proceeding in progress under the supervision of the court. The court has concurrent authority to discipline lawyers, and the State Bar normally will refrain from taking action while a matter which is the subject of the grievance is pending and under the court's direct supervision. In this case, the evidence of rule violations was so clear that the decision was made to proceed with the filing of a complaint even though the criminal proceeding was not complete. At the time the results of the investigation of the grievance were first presented to the Grievance Committee, it appeared that there might be additional rule violations which had not yet been fully investigated. We wanted to have all of the claims against the respondent before the Disciplinary Hearing Commission in the same proceeding. The additional rule violations and information about them became quickly known after the Grievance Committee decision to file a complaint, and we were able to proceed on all claims in a single proceeding before the DHC and without delay. We had to be very careful to avoid making public statements which might have been wrongfully interpreted or prejudiced the outcome. Our officers received many inquiries, and our President Steve Michael and our Executive Director Tom Lunsford handled the responses in an excellent manner. I believe our general counsel Katherine Jean and her staff did a superb job in managing the case and presenting the matter to the DHC. I think that the disciplinary process worked in the way that it was designed to work and am pleased that commentators around the country have complemented the manner in which the case was handled by the State Bar.

Q: You've had a great deal of experience with the Bar's ethics program, having served as Ethics Committee Chair. What's that been like? Are lawyers paying attention? Are they more or less "ethical" than they used to be?

When I graduated from law school, "ethics" was not a required course. The only ethics question on the bar exam in 1975 was, "Can you take a criminal case on a contingency fee?" I had the general idea at that time that so long as you followed the golden rule you would be OK in the practice of law. The ethical obligations of attorneys have become much more complicated over the last 30 plus years. I think the Ethics Committee brings a great deal of experience and knowledge to tough questions that do not always have clear answers. Committee votes that I have witnessed show that reasonable minds can differ on many ethics questions. We have one of the most experienced ethics counsels in the country in Alice Mine. She provides great guidance to the Ethics Committee and to the lawyers of North Carolina on the tough issues that arise on a day-to-day basis. I encourage all lawyers to seek guidance on ethics questions about which they may be unsure as they arise. Today there is a substantive body of formal ethics

With his wife, Bobbie, looking on, Irvin W. Hankins III is sworn in as president of the North Carolina State Bar by Justice Mark Martin.

opinions interpreting the Rules of Professional Conduct. Our Rules of Professional Conduct are our covenant of trust with the public, and the Ethics Committee is a resource for everyone, providing guidance as to what the rules require in particular situations. Of all the committee work that I have done while on the State Bar Council, I enjoyed my time on the Ethics Committee the most. I think the lawyers of North Carolina do pay attention to the decisions of the Ethics Committee, and I believe lawyers are more ethical today than ever before. In the past, many lawyers, by lack of awareness, ignored some ethics rules. Today those rules and our obligations are better known and better understood. I think that the general level of awareness about the ethical responsibilities of lawyers is at a higher level today than ever before.

Q: During the past year the State Bar has sought to increase access to justice by petitioning the Supreme Court for mandatory IOLTA and by seeking legislation to permit "retired" lawyers to provide pro bono legal services. Do you think these initiatives will improve the situation? Should the profession be doing more to make the legal system more accessible?

I believe that mandatory IOLTA and the Pro Bono Emeritus Rule will increase the availability of legal services for the poor in North Carolina. In North Carolina, the various legal services organizations carry that burden, and these new initiatives should make more resources available to legal services. These are important initiatives which I have supported. Mandatory IOLTA should result in a substantial increase of funds available. For instance, in South Carolina, when the same rule change was enacted, the funds available increased by 50%. I think we must see how it works here in conjunction with the pro bono emeritus concept before deciding whether any other steps should be taken by the State Bar regarding this problem. More may be required by society in general to address this problem of legal services for disadvantaged citizens. I do not believe this burden should be borne solely by the legal profession.

Q: Is it true that the State Bar is running out of space in its current headquarters in downtown Raleigh? If so, what do think should be done to address the situation? Is it important for the Bar to remain in downtown Raleigh?

Yes. We have recently initiated a study about our future needs which John McMillan, Tom Lunsford, and I have worked on during the past nine months. We have concluded that the State Bar needs to be in a position to occupy new quarters by about January 1, 2012. I am establishing a Facilities Planning Committee to be chaired by Vice-President Bonnie Weyher which will work over the next year to put a plan in place to permit that to occur. We have engaged a local architectural firm to assist that committee in its work. I believe that our State Bar headquarters should be a functional facility which can accommodate a growing bar for the foreseeable future, at least 25 years. I also believe our State Bar headquarters has a symbolic importance. It should be seen as a symbol of the rule of law and the importance of attorneys in a free society. For that reason, I think it should be at the center of government, in downtown Raleigh, as close as practicable to the capitol, our Supreme Court, and our court of appeals. Architecture, location, and presence can convey a powerful message, and that is what I would like to see in the appearance of our State Bar building for the future. I hope that we can achieve such a presence, commensurate with our resources.

Q: Will it be necessary to increase the State Bar dues in the near future?

Yes. Recently it has been necessary to employ additional personnel to cover a higher volume of new litigation and administrative demands. These needs have arisen because of the effort to pursue entities engaged in the unauthorized practice of law; the increasing number of complaints and grievances handled by our staff; the complexity of the cases litigated, such as the Duke lacrosse case; and the fact that the State Bar must defend itself with respect to suits filed testing the validity of such things as the LAP program and the judicial election surcharge. We must also recognize that we are running out of space and that we must prepare for a move. Acquiring and upfitting a larger facility for the bar will require a financial investment, and we must commence that process now so that we can accrue resources over the years ahead before the time to move has arrived. We are very attentive to the need for "black ink" and fiscal responsibility regarding the budget of the State Bar. To cover the needs that I have mentioned and to make up for the expenses in excess of budget caused by the unexpected events of 2007, the Finance and Audit Committee believes that a $30 annual increase in bar dues is necessary beginning in the year 2008.

Q: What would you like to accomplish during your year as president?

I hope that my year as president can be stable and crisis free, permitting us to focus on improving the State Bar's efficiency, response time, and consistency and on the implementation of initiatives begun over the last two years. These initiatives include mandatory IOLTA, pro bono emeritus, new facility planning, and practice group operating concepts for the office of counsel. When we occupy a new facility, I want to remember fondly that I was a participant in the effort. Most importantly, I want to be the trumpet for the message that trust is the key to the long term strength of the

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Bruno's Top Tips for Tip Top Trust Accounting

By Bruno DeMolli

Top Tips is on vacation this quarter. In lieu of an article, Bruno asked that RPC 150 be published in its entirety to remind lawyers not to link trust and business accounts. Although the opinion was adopted under the Rules of Professional Conduct before revision in 1997, the opinion still provides excellent guidance particularly in light of the Supreme Court's recent order mandating participation in the State Bar's IOLTA program.

RPC 150

January 15, 1993

Linking Trust and Business Accounts

Opinion rules that an attorney cannot permit the bank to link her trust and business accounts for the purpose of determining interest earned or charges assessed if such an arrangement causes the attorney to use client funds from the trust account to offset service charges assessed on the business account.

Inquiry:

Attorney A maintains a trust account and a business account with Sunshine Bank. Attorney A has been a participant in IOLTA. Over the last several months, however, Attorney A's account has been incurring substantial charges (over $400 in the last year).

After repeated inquiries, Attorney A discovered that her business account and trust account were "linked" for the purposes of determining interest earned or charges assessed. Both accounts are subject to a charge per deposit or check, and interest accrues on daily balances such that a substantial balance in the account should offset the check and deposit charges.

Since Attorney A had repeatedly instructed the bank not to debit the trust account for charges, intending to avoid charges for new checks, etc., the bank had linked the two accounts so that the charges from the trust account were assessed against the business account. Of course, being a member of IOLTA, the interest on the trust account balance, which would otherwise have offset the charges, was sent to IOLTA. In effect, Attorney A was paying for contributions to IOLTA. Being deprived of the offsetting interest on the trust account, the numerous checks she wrote for real estate conveyances created a considerable debit.

At this point, the bank has changed both accounts to commercial accounts which do not draw interest, but the balances in the accounts create "credits" which offset the charges per check or deposit. Any negative balance on the trust account is shifted over to the business account.

Does this situation create any ethical problems? Neither account will ever yield a credit in the form of interest income, and hopefully the ongoing balances will offset the debit charges such that they will usually be "free" accounts.

Opinion:

Yes. Under Rules 10.1 [now Rule 1.15] and 10.3 [now Rule 1.15-4], client funds in a trust account may not be used to pay bank service charges or fees of the bank because such funds are the sole property of the client and cannot benefit the attorney. Rules 10.1 and 10.3 do permit the payment of bank service charges and fees of the bank from interest earned on client funds deposited in the lawyer's trust account. The new arrangement established by Attorney A's bank could create ethical problems if the credits and service charges to the trust and business accounts were not accounted for independently. Since the trust and business accounts are "linked" for the purposes of determining interest earned or charges assessed, it would be impossible for one to separate out the specific amount of interest earned or charges assessed for either account. If for a particular statement period the trust account earned more "credits" than it was assessed charges, while the business account was assessed more service charges than it earned "credits," the trust account "credits" could offset the service charges assessed on the business account. Rule 10.1 does not permit the lawyer to use client funds from the trust account ("credits" from the trust account) for the lawyer's personal benefit (the offset of service charges assessed on the business account). ■

In Memoriam

Darryll W. Bolduc
Charlotte

Alfred N. Brumley
Charlotte

Dallas A. Cameron Jr.
Raleigh

Don H. Elkins
Hendersonville

Jack P. Gulley
Raleigh

William H. Gurnee Jr.
Greensboro

Lucius A. Hutson Jr.
Charlotte

Wilbur M. Jolly
Zebulon

Janice L. Mills
Hillsborough

Norman A. Wiggins
Buies Creek

Frank B. Williams
Durham

John B. Yorke
Charlotte

NC IOLTA Becomes Mandatory

On October 11, 2007, the North Carolina Supreme Court ordered the North Carolina State Bar to implement a comprehensive (mandatory) IOLTA program for lawyers in North Carolina, effective January 1, 2008. What this order means is that all active members of the North Carolina State Bar who maintain general client trust accounts in North Carolina must ensure that all of their general client trust accounts are established as interest-bearing IOLTA accounts. Under revised rules governing the NC IOLTA program (approved by the NC State Bar Council on October 19, 2007, and published for comment in this issue of the *Journal*), lawyers will certify annually when paying their NC State Bar Dues—either on the Dues Notice form or electronically—that all general client trust accounts maintained by the lawyer/law firm are IOLTA accounts. Lawyers must be in compliance with this requirement no later than June 30, 2008.

Opening and closing accounts must also be reported to NC IOLTA, which provides a Status Change Form for that purpose. This form is also to be used to report changes in employment or address.

What Do You Need to Do to Respond to This Requirement?

Your response will depend upon your current IOLTA status. Lawyers are presently classified as (1) ineligible to participate in IOLTA; (2) participating in IOLTA; or (3) not participating in IOLTA.

(1) **Currently ineligible or exempt lawyers.** If you are not eligible to participate in IOLTA you will only need to certify when paying your 2008 State Bar dues that you are exempt from the IOLTA program. Lawyers are exempt from the program if they do not handle client funds because they are not in private practice; their law firm does not maintain general client trust accounts in NC; or they do not practice in NC.

(2) **Currently participating lawyers.** If you are currently participating in the NC IOLTA program, you will need to ensure that all general client trust accounts maintained at your law firm are established as IOLTA accounts. (Some law firms maintain both IOLTA accounts and non-interest bearing general client trust accounts.) Then, you will certify to that fact when paying your 2008 State Bar dues.

- Documenting additional accounts for NC IOLTA: When changing any accounts to IOLTA accounts, you will need to provide documentation of the change to the NC IOLTA office. You may use the NC IOLTA Status Update Form, which you can obtain from the NC IOLTA office (by calling 919-828-0477) or from the State Bar website (www.ncbar.gov).

(3) **Currently non-participating lawyers.** If you do not currently participate in NC IOLTA, you must ensure that all general client trust accounts at your law firm are changed to interest-bearing IOLTA accounts, from which the interest, net of service charges, will be remitted to NC IOLTA for funding law-related charitable causes. Then, you will certify to that fact when paying your 2008 State Bar dues.

- Changing your accounts: Banks (including banks that do not presently have IOLTA accounts) have been notified of this requirement for lawyers and have been provided materials about the program to use in assisting lawyers to make these changes, including a checklist for opening IOLTA accounts (available on the State Bar website at: www.ncbar.com/programs/iolta_banks.asp).
- Documenting the change for NC IOLTA: You will need to provide documentation of the change to the NC IOLTA office. You may use the NC IOLTA Status Update Form, which you can obtain from the NC IOLTA office (by calling 919-828-0477) or from the State Bar website (www.ncbar.gov).

NC IOLTA Provides Vital Funding in the Public Interest

NC IOLTA has been a vital source of funding for the provision of civil legal service to the poor through grants made to staffed legal services programs and volunteer lawyer programs that serve every county in the state and for other programs that work to improve the administration of justice. Since its first grants were made in 1984, NC IOLTA has provided over $50 million to legal assistance for at risk children, the elderly, the disabled, and the poor in need of basic necessities, and to help lawyers connect with those who need their pro bono assistance. Other innovative programs have assisted the Administrative Office of the Courts with its work on the need for interpreter services; put law students into public interest summer internships to help them understand the need for public interest and pro bono service; trained local officials on how to provide safe and humane jails; provided first rate judicial education to NC judges; and leveraged state funds provided to assist young lawyers in public interest practice pay off law school loans.

Moving to a Mandatory IOLTA Program Increases Vital Support

Equal access to justice is fundamental to our system of democratic government and necessary to the maintenance of public trust and confidence in the courts. Its denial has an adverse impact not only upon individuals and families, but also on society as a whole.

Lawyers have a professional responsibility to do what they reasonably can to increase the availability of legal services for all, regardless of the ability to pay (*see* Preamble to NC Rules of Professional Responsibility). In recognition of this professional obligation, the North Carolina State Bar adopted in 1983, with the approval of the NC Supreme Court, the Plan for Interest on Lawyers' Trust Accounts (NC IOLTA) by means of which funds generated from interest earned on pooled client trust accounts could be used to provide funding for civil legal aid and other projects that improve the administration of justice.

Despite these and other efforts, statistical information tends to demonstrate that less than 20% of the legal needs of poor people in North Carolina are presently being met. The council of the North Carolina State Bar believes that the conversion of North Carolina's

CONTINUED NEXT PAGE

IOLTA Update

Financial

We continue to record strong income for 2007—$1.1 million for each of the first two quarters. Indications from the third quarter, however, suggest that the income increases we have been seeing may be leveling off. We still hope to improve on last year's income—the highest in NC IOLTA history at just under $4.5 million. To increase income, we have worked to improve policies at participating banks and to increase IOLTA participation.

Grants

Grant applications for 2008 were due to the IOLTA office on Monday, October 1. We received 39 applications requesting over $5 million. For 2007, we reviewed 35 grant applications requesting $4.3 million and made grants of $3.9 million (including $110,000 in matching grant offers). Applications will be reviewed by the IOLTA trustees in early December.

State Funds Administration

As requested by the NC State Bar, IOLTA is now administering state funds provided for civil legal aid work and for the Center for Death Penalty Litigation. The General Assembly increased funds for civil legal aid for the 2007-08 year by increasing by $1 (to $2.05) the amount from filing fees designated for this purpose. For the 2007 calendar year through August, NC IOLTA has disbursed over $3.6 million in state funds for civil legal aid and CDPL.

News and National Association of IOLTA Programs

When the North Carolina Supreme Court ordered the North Carolina State Bar to implement a comprehensive (mandatory) IOLTA program for lawyers in North Carolina, effective January 1, 2008, NC IOLTA joined the list of IOLTA programs converting to mandatory participation. Missouri, Maine, and Alabama have also recently ordered a change to mandatory programs. Following North Carolina's change, there are now only 16 IOLTA programs (out of 52) in which participation is not mandatory.

New Participants

Your Interest Does Make a Difference!

Participation in IOLTA does not affect a lawyer's trust account practices and never affects the principal balance of the account. The participating bank calculates and remits all accumulated interest, less service charges, directly to IOLTA. ***For a complete list of IOLTA participating banks, go to ncbar.gov/programs/banklist.asp.*** Lawyers still retain complete discretion to determine whether a trust deposit is of sufficient size or duration to justify placement in a separate interest bearing account for a client.

To learn more about the IOLTA program or to become a participant, please call the IOLTA office at 919/828-0477.

Thank you to the following attorneys and firms who have joined the NC IOLTA Program since April 2007.

Alexander, Joel T., Pittsboro
Alston, Karen Frasier, Durham
Altman, Kevin, Winston-Salem
Barbour Law Firm, PLLC, Asheville
Bernhardt & Strawser, PA, Charlotte
Blackledge Law, Durham
Bray, D. W. Jr., Fayetteville
Butler Papopas Weihmuler Katz Craig LLP, Charlotte
Carter, Archie, Hassell & Holbrook, LLP, Washington
Cook, Christopher W., PLLC, Charlotte
Craine Lassiter, PA, Raleigh
David & Associates, PLLC, Wilmington
Diepenbrock Mediation Offices, Asheville
Eyster Law Offices, PA, Raleigh
Fanney & Jackson, PC, Raleigh
Ford, Jeanne B., Cary
Foster Kelly, P.A., Charlotte
Gannon, Carla L., Oak Ridge
Gilpin Law Offices, PLLC, Charlotte
Glover, Alice S., PLLC, Chapel Hill
Hagan Davis Mangum Barrett Langley & Hale PLLC, Greensboro
Halus, Eric A., Law Office of, Winston-Salem
Healers of Conflicts Law, Asheville
Henry Law Group, PLLC, Raleigh
Hitchens, David L., PLLC, Charlotte
Hollowell Law Offices, PA, Raleigh
Hope Law Firm, Asheboro
Huffman Law, PLLC, Charlotte
Johnson Law Firm, PA, Arden
Kuruc Law Offices, Raleigh
Malcolm, Joshua D., Pembroke
Matthews, Lynn A., PA, Dunn
McManus, Corey, Monroe
McNeill, James E., Pinehurst
Miller, Gary H., Bryson City
Moore, E. Holt, III, Wilmington
Perry, Shane, PLLC, Terrell
Prelipp & Scottt, Rockingham
Price Law Group, PLLC, Raleigh
Ritter, John L., Seagrove
Rocknich, Nick, III. PA, Waynesville
Schaede, Karen McKeithen, Greensboro
Shell, William R., Wilmington
Smith, J. Kyle, PLLC, Newton
Smith, J. Scott, PLLC, Kernersville
Strange, Ross E., Greensboro
Stricker, Marguerite E., Murphy
Towers, Richard S., High Point
Townsend, John Richard, Lumberton
Twiford Law Firm, PC, Elizabeth City
Underwood, Christine, Statesville
Vereckey, Michelle, Monroe
Wharton, Vernon Lane, Cary
WinslowWetsch, PLLC, Raleigh
Wood, D. Hardison, Cary ■

Mandatory IOLTA (cont.)

voluntary IOLTA program to a comprehensive IOLTA program would greatly enhance the ability of the legal profession to financially support access to justice in North Carolina, a view shared and endorsed by the North Carolina Bar Association and the North Carolina Equal Access to Justice Commission.

Moving North Carolina to a mandatory IOLTA program will provide much needed additional support for our access to justice community and other innovative programs in the public interest without requiring attorneys to provide their time or monetary support. ■

Another Inconvenient Truth

By L. Thomas Lunsford II

It has been brought to my attention that some of our busier members may not have time to wade through my usual blather to get to the inevitably scant factual predicate of this article. For those persons I have decided to furnish the following executive summary.

The cost of being a lawyer in North Carolina just went up. At its meeting on October 19, 2007, the council raised the annual membership fee by $30 to a total of $265 for 2008. This increase, which is still $35 less than the statutory maximum, is necessary to avoid deficit spending in the coming year. Perhaps more important, it is intended to maintain cash reserves in anticipation of a rather considerable capital investment, the acquisition of a new headquarters for the State Bar in the very near future.

For those who desire a richer, or poorer, perspective, depending on your point of view, I offer the following:

I have never been completely comfortable with reality. Generally speaking, I prefer rosy scenarios, political platforms, and cable news. And so it should not be surprising to you, my loyal readers, that I have only recently come to accept the indisputable fact that we are running out of room at the State Bar's headquarters in downtown Raleigh. The former department store out of which we have been retailing ethics opinions, disbarments, and ladies foundation garments since 1979 is overcrowded.

This rather confounding state of affairs can best be understood in the context of my own remarkable career. When I was hired to clean up the legal profession in 1981, I was one of 13 employees at the State Bar. I was one of only three lawyers assigned to handle the disciplinary caseload, some 300 cases that year. The entire active membership of the Bar totaled 5,262. To be honest, it was then inconceivable that our building's capacity would ever be outstripped. Indeed, we found it necessary to rent fully a third of our inexhaustible square footage to the Academy of Trial Lawyers and the Board of Law Examiners. We also had the luxury of maintaining a gigantic meeting room, known as the "council chambers," that was used on average about once a month. During the Reagan administration, as I began my meteoric rise to the lofty perch I now occupy, the Bar's staff grew steadily to service an increasing lawyer population and support several new programmatic initiatives, like mandatory continuing legal education, legal specialization, and IOLTA. By 1992, my inadequacies as a trial lawyer had become evident and my promise to "stamp out lawyer misconduct in six months" had been totally discredited. Happily enough, there was at that time an opening in the executive suite and I was, somewhat abruptly, "kicked upstairs." When I became the CEO, there were 26 people on the staff, including five trial lawyers. The State Bar had 12,616 active members.

Today, we have 73 employees, 69 of whom work in the building. The Academy and the BLE are long gone, having been ousted many years ago to accommodate our growth. The "council chambers" and virtually all of our conference rooms have been recaptured as space for offices and cubicles. Thus far, I have personally been spared the indignity of having to share my office with another employee, but "hotbunking" is becoming a fact of life for several of our people. In a way, it's reminiscent of Dr. Zhivago's return to his in-laws' spacious townhouse in Moscow following the revolution. Who would have thought that there was space for 37 families in the drawing room? Or that Alec Guinness would be a communist?

Actually, of course, it's really not that bad, yet. But we are approaching a critical moment and suppose that sometime within the next five years, probably sooner rather than later, we will run out of options in our current facility. For better or worse, professional regulation is a growth industry. In our case, this is largely a function of increasing membership. We now have 22,255 active members. Over the last five years our rolls have increased by approximately 3.5% annually. At this rate, the population of lawyers will double within 19 years. And there is no end in sight. Our state's law schools are operating at capacity and more are coming online. As the charms and opportunities afforded by North Carolina and its vibrant economy become more and more obvious to lawyers in other parts of country, comity applications and admissions are bound to grow. Intuition, statistics, and experience tell us that as our membership grows, so do our regulatory responsibilities and our need for competent employees. For instance, it now takes 11 lawyers to handle the disciplinary caseload, which has quadrupled since 1981.

While it is difficult to predict with precision how many people will be required to administer the Bar 20 years from now, it may be prudent to plan for staff growth that is proportionate to the increase in membership. To be sure, a lot depends on programmatic developments, but it seems unlikely that the burdens of self-regulation and consumer protection will shrink. If anything, more is likely to be asked of the State Bar and required of lawyers. At any rate, the math is fairly simple

if we assume that increases in lawyer population will require proportionate increases in staff. In 20 years, if growth is steady at current rates, we will have 46,206 active members, and need a staff of 152 dedicated professionals.

It's comforting to suppose that my well known weaknesses in math and fortunetelling have inclined me to overestimate our needs in the preceding paragraph. For what it's worth, I think a staff of 120 will probably suffice, if we're good at leveraging technology. Even so, the conclusion that we will soon need a new home is ineluctable. For that reason, we are fortunate that our new president, Hank Hankins, has already commissioned a special committee to superintend the planning process. Vice-president Bonnie Weyher will chair the "Facilities Committee" and have it begin work immediately. A Raleigh architectural firm, Clearscapes, PA, has been retained to consult with the committee regarding the sort of facility that the Bar will be needing over the next couple of decades, and to assist in identifying possible locations for the new headquarters.

Speaking of location, it is apparent from our survey of the Bar Council that there is considerable sentiment in favor of a "downtown solution." Most of your representatives appear to share my view that if it is financially reasonable to do so, the North Carolina State Bar should remain in the heart of Raleigh, near the seat of government, in a building that connotes through its placement and design the profession's enduring presence and its fundamental association with the state and the rule of law. That being the case, we will at the threshold be looking for a visible location not far removed from our present situation on Fayetteville Street. Within that parameter, all alternatives will be considered, including new construction, adaptive reuse of an older structure, and acquisition of something suitable from existing commercial inventory. Our intention at this point is to purchase, rather than rent, our headquarters, for all the usual reasons. Ownership should enable us to control our costs, realize a decent return on our (your) investment, and use the property to its best advantage. Our experience as the owner of the current facility has certainly confirmed the wisdom of this approach.

Even as we undertake to find a downtown solution, we must, however, admit the possibility that circumstances could force us to flee to the suburbs, the urban corridors, or even Cary. Well, probably not Cary. Property in central Raleigh is becoming rather expensive as the city's efforts to revitalize downtown gain traction and momentum. It is also obvious that there are fewer suitable sites on the market now than a few years ago. In addition, there are costs of doing business in downtown that are almost nonexistent away from the center city. Parking is the best example. We spend tens of thousands of dollars each year to provide reserved parking spaces for staff and volunteers. Appurtenant blacktop, which is a very scarce and costly commodity downtown, abounds in the 'burbs, and would be a very beguiling amenity.

Closely related to the parking issue and also worth considering as we go forward, is the somewhat broader subject of transportation. Very few of our employees live inside the beltline in Raleigh. Most, for various reasons, including the high cost of residential real property in the Capital City, reside many miles from the office and commute from all points on the compass. We have people driving from Rocky Mount, Clayton, Wake Forest, Garner, Chapel Hill, and Greensboro, to name a few of Raleigh's bedroom communities. One thing the employees all have in common is the fact that they have all made their peace with the daily journey back and forth to downtown Raleigh. For us to move far in any direction would disadvantage many of these indispensable public servants and could "cost" us a great deal in terms of personnel. Of course, strategic relocation near the interstate might make it easier for many people from out of town to get to the State Bar. Some councilors like that idea and argue with considerable force that office "parks" afford the most "bang for the buck." They also point out that several other licensing boards have chosen such financially responsible obscurity. That is certainly true, and we may ultimately determine that our address should be on a service road next to a Motel 6, but I think that would be quite disappointing.

There are other commuting issues. In particular, there is the matter of public transportation. Anyone who has spent any quality time on I-40 lately knows that mass transit is our only hope for the future. Inevitably, downtown Raleigh will be one of the hubs for a light-rail system. Can we afford to disregard this fact as we plan for the next quarter century? And what about shorter trips? Downtown will soon have two hotels well equipped to host meetings of the sort we hold on a quarterly basis. As guests in such hotels, councilors can, if they wish, park their cars and leave them for days at a time, "commuting" by elevator to their various committee meetings and strolling around downtown Raleigh to avail themselves of increasingly abundant restaurants and diversions. Our building needs to be in relatively close proximity to such a facility to enable the staff to efficiently support the council's meetings. A downtown location would serve quite nicely in this regard.

To be sure, the ultimate decision as to where and how we will be housed will be very much a function of cost. You can be certain that the council and its leadership will throughout the process be engaged in a rigorous cost/benefit analysis as it weighs the considerations noted above and many other factors. Fortunately, we find ourselves at the moment in a rather favorable financial position. At year end, we expect to have cash reserves of approximately $1,650,000. These funds will be available not only as a down payment, but will also enable us to readily absorb the preliminary costs of consultation, site identification, and design. We are also the owners of what we believe is a rapidly appreciating piece of real property. While we have no current appraisal and value is very much a "moving target," it seems likely that a substantial portion of the cost of our new headquarters can be funded from the disposition of our existing building. The balance of that cost, which is presently unknowable, will have to be borrowed or funded directly from dues or special assessment. We will keep the membership fully informed as the situation unfolds.

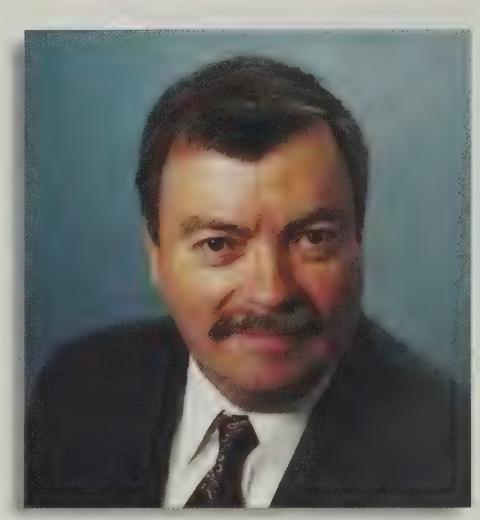
One last thing, it does not appear that we will be soliciting contributions from the people we regulate. To insure our credibility as a self-regulating agency, there can be no basis for anyone's supposition that influence can be purchased or favor curried through such donations. For that reason, we do not anticipate the marketing of "naming opportunities," and will soon be facing the stark reality of having our new utility closet denominated in only the most generic sense. To avoid that calamity, I suggest that it be named for me. ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.

A Profile in Specialization—Mark E. Sullivan

AN INTERVIEW WITH DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Mark E. Sullivan, a board certified specialist in Raleigh. Sullivan earned his undergraduate degree at Kenyon College in Ohio and his law degree at the University of Virginia. He is a principal of the Law Offices of Mark E. Sullivan, PA.. He became a board certified specialist in family law in 1989. Following are some of his comments about the specialization program and the impact it's had on his career.



Q: Why did you pursue certification?

In 1987, when the specialization program began, I was vice chair of the Family Law Section with Howard Gum of Asheville as chair. We had extensive discussions about whether or not family law was a good fit for the program and the impact it would have on lawyers throughout the state. I felt strongly that offering a family law specialty would be beneficial to both lawyers and clients. I sat for the first exam in 1989 and have supported the program ever since.

Q: How did you prepare for the examinations?

I sat and read the family law chapters in the General Statutes. I had been practicing, at the time, for 18 years, but I was amazed at how much I learned from that process.

Q: What do your clients say about your certification?

I don't typically discuss the certification with clients, unless they bring it up. Some have sought me out because they've learned about the certification, typically through some type of web search.

Q: Are there any hot topics in your specialty area right now?

The impact of taxes on equitable distribution is under a lot of scrutiny. We have a new statute which allows, but doesn't require, the court to factor in potential taxes. Also, we are an increasingly mobile society with spouses/parents moving because of health, jobs, new spouses, and other family obligations. This leads to even greater challenges in the area of custody relocation decisions. Finally, the issues of custody and visitation for military personnel are at the forefront of family law discussions while so many members of the military are stationed out of the country.

Q: How do you stay current in your field?

I remember noticing a few years ago when I looked at my annual continuing legal education (CLE) form that I had 80 plus hours in one year. I thought that was a lot and wondered about the time spent in classes as that's two weeks worth of otherwise billable hours. Just last year I took even more courses, topping 100 hours of CLE annually. This is in addition to reading the *ABA Journal, Litigation,* and legal newspapers including *NC Lawyers Weekly* and *Lawyers USA,* as well as quite a few state, ABA, and military community listserves. The value of devoting so much time and energy to staying current in this field is immeasurable. I see the results and I know my clients benefit from the knowledge I gain.

Q: How does specialization benefit the public and the profession?

The certification program serves as a consumer protection device. It provides a way for clients to say that they're more likely to get value and competence by knowing their lawyer has achieved the required level of experience, training, practice, and CLE. The client can look at his/her situation and think that if anyone should know how to handle this, his/her specialized lawyer should.

Participating in the program raises the benchmark for all family lawyers. Becoming a certified specialist can play a key role in a successful practice, but in family law, the most important things to the clients are still that you listen to their story, actively manage their case, and are able to provide to them a dispassionate analysis of the pros and cons in their situation. You owe the client not the "best" or "most optimistic" case review, but an honest review and a solid understanding of what to expect and how to prepare.

Q: Who are your best referral sources?

The majority of my clients come from other attorney referrals, word of mouth from satisfied clients, and internet searches. I have quite a few published articles, particularly on military issues, which prospective clients find and read online. Because of that, I get calls from lawyers and prospective clients in other states on a regular basis.

Q: How has becoming a specialist shaped your practice?

My practice has become very focused on some of the more complicated family law issues, including how members of the military are impacted by divorce, custody, and equitable distribution. I've been affiliated with the NC State Bar Legal Assistance for Military Personnel (LAMP) Program for many years now and have written many articles for both prospective clients and other

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The Problem with Attorney Charging Liens

By Carmen K. Hoyme

Despite using her best efforts on behalf of a client, sometimes a lawyer won't get the contingent fee she anticipated for the representation. When a client discharges the lawyer before the case is settled or reaches final judgment, the lawyer receives no payment for her (sometimes considerable) work on behalf of the client. What's a lawyer to do? Remedies are available, *but asserting an attorney charging lien is not one of them.* In North Carolina, the availability of attorney charging liens is strictly limited.

Since 1978, the North Carolina Court of Appeals has defined an attorney charging lien as: "An equitable lien which gives an attorney the right to recover his fees 'from a fund recovered by his aid.' The charging lien attaches not to the cause of action, but to the judgment at the time it is rendered." *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992) (quoting *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E.2d 305 (1978)). Thus, no charging lien is available "until there is a final judgment or decree to which the lien can attach," and any attempt to assert the lien prior to a final judgment is void. *Howell v. Howell*, 89 N.C. App. 115, 365 S.E.2d 181 (1988); *see Dillon v. Consolidated Delivery, Inc.*, 43 N.C. App. 395, 258 S.E.2d 829 (1979); *Covington*, 38 N.C. App. 61, 247 S.E.2d 305.

The *Mack* court also explained that a charging lien is unavailable to a lawyer who withdraws or is discharged by the client "prior to settlement or judgment being entered in the case:"

> At the time when [a former attorney's] purported charging lien...would... attach[], the time of judgment in favor of [the attorney's former client]..., the judgment [would not be] a fund recovered by the [attorney's] aid, as he [has withdrawn. The former attorney is] entitled to no interest in the fund.

Id. (quoting *Howell*, 89 N.C. App. at 118, 365 S.E.2d at 183) (alterations in original). Thus, an attorney charging lien may *only* be asserted by a lawyer who represented the client *through the entry of the judgment or settlement and it is against the judgment or settlement*[1] that the lien is asserted.

A charging lien may not be asserted by a lawyer whose representation ended prior to the judgment or settlement, *regardless of how much work the lawyer did on the case or the terms of the fee agreement* between the terminated lawyer and the client. The exclusive remedy for the former lawyer is to bring an action in *quantum meruit* to recover the reasonable value of the legal services he or she performed for the client. "[A]n attorney discharged with or without cause can recover only the reasonable value of his services as of that date." *Covington*, 38 N.C. App. 61, 247 S.E.2d 305. The discharged lawyer may bring the *quantum meruit* action against either the former client, *id.*, or the former client's subsequent lawyer. *Pryor v. Merten*, 127 N.C. App. 483, 490 S.E.2d 590 (1997).

The Rules of Professional Conduct do not expressly address charging liens. The availability of a charging lien is determined by North Carolina common law. Nonetheless, a lawyer violates the Rules of Professional Conduct by asserting a charging lien or representing that a charging lien exists when such a lien is not permitted under North Carolina law. *See* Rule 1.5(a) (lawyer may not charge or collect an illegal fee). This issue most often arises when a lawyer who was discharged from a personal injury case prior to settlement notifies the tortfeasor's insurance carrier that it must satisfy the lawyer's lien when it settles the former client's claim. The lawyer's representation that a lien exists is false and misleading in violation of Rule 4.1. Asserting a lien typically delays or complicates settlement of the former client's claim in violation of the lawyer's duty under Rule 1.16(d) to assist the former client upon termination of the client-lawyer relationship. In asserting a lien that is not allowed by law,[2] the lawyer uses information obtained during the client-lawyer relationship, including the existence of the former client's claim and the identity of the tortfeasor's insurance carrier, to the disadvantage of the former client in violation of Rule 1.9(c).

Even when a lawyer does not actually assert an unauthorized charging lien, the lawyer may run afoul of the Rules by inaccurately characterizing his or her right to a lien in the fee agreement. It is permissible to discuss charging liens in a fee agreement, but the reference thereto must explain the limited circumstances under which the lawyer is legally authorized to assert such a lien. It is false and misleading in violation of Rule 1.5(a) and Rule 4.1 for a fee agreement to state that, if discharged prior to the conclusion of the case, the lawyer will have a lien against any subsequent recovery by the client. In addition, this type of inaccurate blanket assertion has a chilling effect on a client's right to terminate the relationship before the case is resolved, and thereby compromises a client's right to be represented by whom the client pleases.

Lawyers must be honest and candid about not only their clients' rights, but also their own. A lawyer—even one left uncompensated for legal work—may not misrepresent the law, including the law of North Carolina that strictly limits the lawyer's right to assert a charging lien. ■

Carmen Hoyme is deputy counsel at the North Carolina State Bar.

Endnotes

1. In the absence of clarification from the courts, an "entry" of settlement requires the execution of a release by the client and the filing of a voluntary dismissal with prejudice. In practice, the final accounting for the client's funds, see Rule 1.15-3(d), prepared by the lawyer concluding the matter, generally is signed by the client at the time the release is executed. The final accounting should note a fee disbursement to the lawyer who concluded the matter and the client's consent thereto.
2. Rule 1.6(b)(6) allows a lawyer to disclose confidential client information as reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." However, assertion of a lien claim, when none is allowed by law, does not fall within this exception to the duty of confidentiality.

Assisting the Depressed Lawyer

By Ann Foster

Find out More about Depression

What is depression?

Depression is more than the blues or the blahs; it is more than the normal, everyday ups and downs. When that "down" mood, along with other symptoms, lasts for more than a couple of weeks, the condition may be clinical depression. Clinical depression is a serious health problem that affects the total person. In addition to feelings, it can change behavior, physical health, appearance, professional performance, social activity, and the ability to handle everyday decisions and pressures.

What causes clinical depression?

We do not know all the causes of depression, but there seem to be biological and emotional factors that may increase the likelihood that an individual will develop a depressive disorder. Research over the past decade strongly suggests a genetic link to depressive disorders—depression can run in families. Difficult life experiences and certain personal patterns such as difficulty handling stress, low self-esteem, or extreme pessimism about the future can increase the chances of becoming depressed.

How common is it?

Clinical depression is a lot more common than most people think. It will affect more than 19 million Americans this year. Early 1990s research indicated that lawyers might be more vulnerable to depression than other professionals. Almost half of all callers to the Texas Lawyer Assistance Program hotline talk about symptoms that sound like depression.

Is it serious?

Depression can be very serious. Suicide is often linked to depression. Male lawyers in the United States are two times more likely to commit suicide than men in the general population.

Are all depressive disorders alike?

There are various forms or types of depression. Some people experience only one episode of depression in their whole life, but may have several recurrences. Some depressive episodes begin suddenly for no apparent reason, while others can be associated with a life situation or stress. Sometimes people who are depressed cannot perform even the simplest daily activities like getting out of bed or getting dressed. Others go through the motions, but it is clear that they are not acting or thinking as usual. Some people suffer from bipolar disorder in which their moods cycle between two extremes—from the depth of desperation to frenzied talking or activities or grandiose ideas about their own competence.

Can it be treated?

Yes, depression is treatable. Between 80 and 90% of people with depression can be helped. There are a variety of antidepressant medications and psychotherapies that can be used to treat depressive disorders. Some people with milder forms may do well with psychotherapy alone. People with moderate to severe depression most often benefit from antidepressants. Most do best with combined treatment: medication to gain relatively quick symptom relief and psychotherapy to learn more effective ways to deal with life's problems, including depression.

The most important step toward overcoming depression—and sometimes the most difficult—is asking for help.

Why don't people get the help they need?

Often people don't know they are depressed so they don't ask for or get the right help. Most people fail to recognize the symptoms of depression in themselves or in other people. Also, depression can sap energy and self esteem, thereby interfering with a person's ability or wish to get help.

Be Able to Tell Fact from Fiction

Myths about depression often separate people from the effective treatments available. Friends and colleagues need to know the facts. Some of the most common myths are these:

Myth: He's such a great lawyer, he just can't be depressed!

Fact: Lawyers get depression, too. Intelligence, success, or position in the community are not barriers to depression.

Depression can affect people of any age, gender, race/ethnicity, or economic group.

Myth: Lawyers who claim to be depressed are whiners and weak and just need to pull themselves together. There's nothing that we can do to help.

Fact: Depression is not a weakness but a serious health disorder. People who are depressed need professional treatment. A trained therapist or counselor can help them learn more positive ways to think about themselves, change behaviors, cope with stress and problems, or handle relationships. A physician can prescribe medications to help relieve the symptoms of depression. For most, a combination of psychotherapy and medication is beneficial.

Myth: Talking about depression only makes it worse.

Fact: Talking about things may help a friend or colleague recognize the need for professional help. By showing friendship and caring concern, and by giving uncritical support, you can encourage your friend or colleague to talk to a trusted adult, someone at the North Carolina Lawyer Assistance Program, or mental health professional about getting treatment.

Know the Symptoms

The first step toward defeating depression is to define it. People who are depressed often have a hard time thinking clearly or recognizing their own symptoms. They may need your help.

Review the following and note if a friend or colleague has had any of these symptoms persisting longer than two weeks:

Do they express feelings of:

- Sadness or emptiness
- Hopelessness, pessimism, or guilt
- Helplessness or worthlessness

Do they seem:

- Unable to make decisions
- Unable to concentrate and remember
- To have lost interest or pleasure in ordinary activities like sports, hobbies, or social activities
- To have more problems at work and at home

Do they complain of:

- Loss of energy and drive—so they seem "slowed down"
- Trouble falling asleep, staying asleep, or getting up
- Appetite problems: are they losing or gaining weight
- Headaches, stomach aches, or back aches
- Chronic aches and pains in joins and muscles

Has their behavior changed suddenly so that:

- They are restless and more irritable?
- They want to be alone most of the time
- They've started missing work, deadlines, appointments, or dropped hobbies or activities
- You think they may be drinking heavily or taking drugs

Have they talked about:

- Death
- Suicide—or have they attempted suicide

How to Help

If you checked several of the above, your friend or colleague may need help. The most important thing you can do for someone who is depressed is to get him or her to a professional for an appropriate diagnosis and treatment. Don't assume that someone else is taking care of the problem. Negative thinking, inappropriate behavior, or physical changes may need to be addressed as quickly as possible. Your help may include the following:

- Give suggestions of names and phone numbers of reputable therapists or psychiatrist.
- Encourage or help the individual to make an appointment with a professional and accompany the individual to the doctor.
- Encourage the individual to stay with treatment until symptoms begin to abate.
- Encourage continued communication with the doctor about different treatment options if no improvement occurs.
- Offer emotional support, understanding, patience, friendship, and encouragement.
- Engage in conversation and fellowship, listen.
- Refrain from disparaging feelings; point out realities and offer hope.
- Take remarks about suicide seriously, do not ignore them and don't agree to help keep them confidential. Report them to the individual's therapist or doctor if your friend or colleague is reluctant to discuss the issue with you or his or her doctor.
- Invite the individual for walks, outings, to the movies, and other activities. Be gently insistent if your invitation is refused.
- Encourage participation in some activity that once gave pleasure—hobbies, sports, religious or cultural activities.
- Don't push the depressed person to undertake too much too soon; too many demands may increase feelings of failure.
- Eventually with treatment, most people get better. Keep that in mind and keep reassuring the depressed person that with time and help, he or she will feel better.

Where to Get Help

The North Carolina Lawyer Assistance Program (LAP) can help you in a variety of ways by providing diagnostic counseling, education and training resources, assistance with identifying reputable mental health professionals and treatment options in your community, strategies and coaching for conversations with your friends or colleague, and information about suicide prevention resources. In certain circumstances, the LAP may be able to directly assist in your conversations with your colleagues or friends.

If you don't access the LAP, please consider contacting other resources who can help prepare you with names, phone numbers, and other information about where to send your friend or colleague for assessment and treatment. These resources may include family doctors, psychiatrists, psychologists, social workers, licensed professional counselors, community mental health organizations, hospital psychiatric departments and outpatient clinics, university or medical school affiliated programs, state hospital outpatient clinics, family service and social agencies, clergy, private clinics, employee assistance programs, and local medical or psychiatric societies.

Act Now

Early and professional treatments for depression can lessen the severity of the illness, reduce the duration of symptoms, and may also prevent additional bouts of depression. ■

Ann D. Foster, JD, MAC, is the director of the Texas Lawyers' Assistance Program and the State Bar of Texas Employee Assistance Program. The article first appeared in the Texas Bar Journal *and is reprinted with permission.*

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll free: Don Carroll (for Charlotte and areas west) at 800-720-7257, Towanda Garner (in the Piedmont area) at 877-570-0991, or Ed Ward (for Raleigh and down east) at 877-627-3743. Don is the author of A Lawyer's Guide to Healing *published by Hazelden.*

Specialization (cont.)

lawyers. In 2006, I wrote *The Military Divorce Handbook* for the American Bar Association and recently authored a new statute, G.S. 50-13.7A, dealing with protection for military personnel who are serving out of the country. I also teach regularly at the naval JAG school in Charlottesville and the Army Justice School in Rhode Island. Being a board certified specialist has contributed to success of my practice and enabled me to focus on helping other professionals learn and understand the laws that affect those dealing with divorce and custody issues, both inside and outside of the military. ■

For more information on programs and resources for members of the military, please visit the Legal Assistance for Military Personnel (LAMP) website at www.nclamp.gov. For more information about the specialization program, contact Denise Mullen at 919-828-4620 x255 or dmullen@ncbar.gov, or visit us on the web at www.nclawspecialists.gov.

Adele Wayman

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of State Bar building. The artworks enhance the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Collectors Gallery (successor to the Raleigh Contemporary Gallery), the artists' representative, for arranging this loan program. The Collectors Gallery is a full service gallery that represents national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact Rory Parnell or Megg Rader at TCG, 323 Blake Street, Raleigh, NC 27601 (919.828.6500).


Winter Trees

Adele Wayman is currently Hege Professor of Art at Guilford College in Greensboro, North Carolina, where she has taught since 1973. She received an Excellence in Teaching award from Guilford where she continues to enjoy teaching art to undergraduates. She has been head of the art department as well as clerk of the faculty there.

Adele received her MFA in Painting from the University of North Carolina at Greensboro, in 1978. She completed her undergraduate degree, a BA cum laude, from Vassar College in 1965. Subsequently she studied art at the Corcoran School of Art in Washington, DC, and at the Tyler School of Art in Rome, Italy. She worked in museum education, first at the Corcoran Gallery in Washington, DC, and then as assistant director of education at the Wadsworth Atheneum in Hartford, Connecticut.

Adele has given many lectures on art history and her own paintings at the Weatherspoon Gallery, UNC-Greensboro, the Women's Caucus for Art, SECCA, Fayetteville Museum, and Mary Washington College. She received two artist residence grants, both in New York state, one at Yaddo, and another at the Millay Colony for the Arts. She has exhibited her work in NYC and Boca Raton with Bernice Steinbaum's gallery. Her work has also been shown in DC at Gallery K and Gallery 10, and in 2002 in a solo exhibit at Sidwell Friends School. Her work has been widely exhibited in North Carolina in invitational and juried exhibitions. Exhibits in the last two years have included a juried show called *Elements* at the Greenhill Center for NC Art in Greensboro; a juried show titled *Art and the Feminine Divine* at the Longview Gallery in Raleigh; a juried exhibit at Waterworks Gallery in Salisbury; a three person exhibit at the Theatre Art Gallery in High Point and in a group exhibit in Beijing, China.


Morning Reidsville

Adele is co-curator (with Anne Deloria) of the upcoming exhibit *Artists Make Altars*, in which she and five other artists will show their work at the Longview Gallery in Raleigh in February and March, 2008. Her installation titled *Hold in the Light*, is now on display at the Guilford College Art Faculty Biennial in Greensboro, NC. Adele also currently has a solo show titled *Luminous Seeds* at Holy Ground in Asheville, NC. ■

Lawyers Receive Professional Discipline

Disbarments

Charles D. Blackwell of Reidsville was disbarred by the DHC upon his conviction in federal court of one count of possession of child pornography.

The Wake County Superior Court disbarred Charlotte lawyer **Daniel A. Fulco**. Fulco admitted that he misappropriated at least $267,000.00 entrusted to him in a fiduciary capacity.

The DHC disbarred Winston-Salem lawyer **William C. Myers**. Myers admitted that he misappropriated at least $28,000.00 entrusted to him in a fiduciary capacity.

Suspensions & Stayed Suspensions

Jacksonville lawyer **Janet P. Reed** was suspended for five years. The suspension is stayed for five years on numerous conditions. Reed instructed her client that he need not appear in response to a subpoena, obtained an emergency child custody order without informing the court of all relevant circumstances, including the facts that the opposing party was represented by counsel and that substantially similar litigation had very recently been dismissed, failed to notify the opposing party's counsel that the order was being sought, disobeyed the local rules of a tribunal, and made false representations to the court on more than one occasion.

Jonathan Mark Brooks, formerly of High Point, was suspended for three years. Brooks made false statements in an affidavit filed in court, fabricated a document attached to the affidavit, improperly disclosed confidential client information in the affidavit, and failed promptly to turn over the client file when the representation ended. After 1 year, Brooks can apply to have the remainder of the suspension stayed upon satisfaction of enumerated conditions.

Scott E. Hawkins was suspended for three years. Hawkins can apply after one year to have the remainder of the suspension stayed on enumerated conditions. Hawkins engaged in the unauthorized practice of law in South Carolina, contacted a represented party, entered into a business transaction with his client, and failed to respond to the Bar.

David R. Shearon of Raleigh was suspended for three years. Shearon can apply after one year to have the remainder of the suspension stayed on enumerated conditions. Shearon failed to respond to the Bar, disbursed funds in a manner contrary to the HUD-1 Settlement Statement without the knowledge or consent of the lender, made misrepresentations to a client, and failed to act diligently on behalf of his client.

David Craft's license was previously suspended for 12 months pursuant to a DHC Consent Order of Discipline. The suspension was stayed on certain conditions. Craft failed to comply with those conditions. By Consent Order, the stay was lifted and the suspension was activated.

The DHC stayed the remaining portion of a suspension of the license of Charlotte lawyer **Bounthani Vongxay**. The hearing committee found that Vongxay had satisfied the conditions necessary for the stay to be granted.

Censures

Allan L. Shackelford, formerly of Greensboro and now of New York or Vermont, created a conflict of interest between his firm and an organization represented by his firm, and a conflict of interest between his firm and a plaintiff corporation his firm represented. Shackelford denied under oath his involvement in creating the conflict. After a DHC complaint was served upon him, Shackelford accepted the Grievance Committee's censure.

Orrin Robbins of Chapel Hill was censured by the Grievance Committee for neglecting clients' cases and failing to respond promptly to the State Bar.

Richard A. Horgan of Wilmington was censured by the Grievance Committee. Horgan facilitated the unauthorized practice of law by North Carolina Small Business Association, LLC (NCSBA). NCSBA sold estate planning services involving living trusts and held itself out as able to provide legal services. Horgan prepared living trusts and other estate plan legal documents for NCSBA customers and delivered the documents to a representative of NCSBA. The NCSBA representative met with the customer, oversaw execution of the documents, and assisted the customer with funding of the living trust.

Kathryn Kelling of Charlotte was censured for releasing escrowed funds contrary to the court's order and without approval of all parties.

Raleigh lawyer **Lawrence S. Maitin** was censured by the Grievance Committee. Maitin associated with Eric August to facilitate real estate closings. Maitin failed to supervise August, resulting in theft of client funds and a fraudulent real estate transaction, assisted August's unauthorized practice of law, and failed to reconcile his trust account.

Reprimands

By consent order entered on August 2, 2007, the DHC reprimanded **Nancy P. Quinn** of Greensboro for her lack of promptness in disbursing settlement funds received and failing to reconcile her trust account on a quarterly basis.

William Batchelor was reprimanded by the Grievance Committee. Batchelor collected a flat fee but later began billing his client at an hourly rate without renegotiating the agreement.

Robert Harris was reprimanded by the Grievance Committee for failing adequately to supervise non-lawyers, resulting in their mishandling closing funds.

The Grievance Committee reprimanded **Tonza D. Ruffin**. Ruffin's partner, Teresa Smallwood, represented Ruffin in the closing of Ruffin's personal home refinance loan. Smallwood confessed to Ruffin that she had embezzled the loan proceeds from the firm trust account. Ruffin failed to report the embezzlement to the State Bar and failed to disclose the embezzlement in her response to the Grievance Committee's Letter of Notice. The Grievance Committee found no evidence

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Amendments Approved by the Supreme Court

At a conference on August 23, 2007, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Amendments to Codify the Rulemaking Procedures of the State Bar

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

The State Bar Council has consistently followed a specific procedure for adopting and amending the rules of the State Bar; however, the procedure itself was not previously codified in the official rules of the State Bar. The new section of the State Bar rules sets forth the procedure.

Amendments to Eliminate Outdated References to Fee Arbitration

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

The amendments eliminate references to "fee arbitration" and replace them with references to "fee dispute resolution" consistent with earlier changes to the rules for the fee dispute resolution program.

Amendments to the Certification Standards for the Criminal Law Specialty

27 N.C.A.C. 1D, Section .2500, Certification Standards for the Criminal Law Specialty

The amendments clarify the examination requirements for applicants for certification in the subspecialty of criminal appellate practice.

Amendments to the Rules Concerning the Registration of Prepaid Legal Service Plans

27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans

The amendments provide a procedure for the revocation of prepaid legal service plan registrations under certain circumstances. Additional amendments increase clarity, conform the rules to existing practice, and delete obsolete provisions.

Amendment to the Rules of Professional Conduct to Conform to Changes in Rules on Prepaid Legal Service Plans

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 7.3 of the Rules of Professional Conduct is amended to conform the rule to the changes to the rules concerning the registration of prepaid legal services plans referenced above.

Amendments Pending Approval of the Supreme Court

At a meeting on October 19, 2007, the council of the North Carolina State Bar voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval.

Amendments to Rules on Classes of Membership

27 N.C.A.C. 1A, Section .0200, Membership—Annual Membership Fee

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The amendments accommodate revisions to N.C.G.S. §84-8 and §84-16 by providing procedures for North Carolina lawyers and lawyers licensed in other jurisdictions to seek permission to practice pro bono on behalf of indigent persons under the auspices of nonprofit legal services organizations.

Amendments to Rules on the Organization of Judicial District Bars

27 N.C.A.C. 1A, Section .0900, Organization of the Judicial District Bars

The amendments state the correct amount of the late fee for delinquent payment of judicial district bar dues as established by N.C.G.S. §84-18.1. The amendments also eliminate the incorrect inference that the State Bar grants waivers of the annual membership fee and clarify that a district bar may waive the late fee upon a showing of good cause.

Amendments to Model District Bar Bylaws

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

The amendments add a standing committee on professionalism to the model bylaw on the committees of a judicial district bar.

Amendments to the Rules Governing the Practical Training of Law Students

27 N.C.A.C. 1C, Section .0200 Rules Governing Practical Training of Law Students

The amendments accommodate revisions to N.C.G.S. §84-8 which expand practice opportunities for student interns for employment by government agencies. The amendments also permit internships with clinical programs at law schools seeking accreditation.

Amendments to the Procedures for the Administrative Committee

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The amendments establish the prescribed procedure applicable to all situations in which the State Bar seeks to suspend a member for apparent noncompliance with membership obligations.

Amendments to the Rules Governing CLE

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The amendments to Rule .1601 allow 45 days for the processing of accreditation appli-

cations, require only one set of written materials with a request for accreditation, and charge interest at the legal rate for late payment of CLE sponsor fees. The amendments to Rule .1604 allow for prerecorded telephone seminars with multiple participants provided there is a live question and answer session with the presenter.

Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

The amendments clarify that the Board of Paralegal Certification may suspend as well as revoke certification for the reasons set forth in Rule .0121, and add that certification may be suspended or revoked for violating the examination confidentiality agreement.

Amendments to the Trust Accounting Rules in the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15 of the Rules of Professional Conduct, which has four subsidiary rules or subparts, sets forth the procedural requirements for maintaining a lawyer's trust account. The amendments to Rule 1.15 are generally intended to accommodate relatively recent changes in the banking laws and the banking industry with reference to the necessity of substituting electronic communication and imaging in lieu of written documentation.

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

Proposed Amendments

At its meeting on October 19, 2007, the council voted to publish the following proposed rule amendments for comment from the members of the bar.

Proposed Amendments to the Rules Governing IOLTA

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15-2

On October 11, 2007, the North Carolina Supreme Court entered an order, pursuant to its inherent power to supervise and regulate the conduct of lawyers, directing the North Carolina State Bar to implement a comprehensive IOLTA program and requiring that all active members of the State Bar who maintain general client trust accounts in North Carolina participate in the program. The order is effective January 1, 2008. The proposed rules amendments implement the comprehensive IOLTA program and require compliance no later than June 30, 2008.

.1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for ~~Disposition of Funds Received by the North Carolina State Bar from~~ Interest on Lawyers' Trust Accounts **and administer the IOLTA program (NC IOLTA)**. ~~The plan is:~~ Any funds remitted to the North Carolina State Bar from ~~depository institutions~~ **banks** by reason of interest earned on **general** trust accounts established by lawyers pursuant to Rule 1.15-**2(b)** of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds ~~received thereafter~~ **earned on or** with respect to these funds**, net of banking charges described in section .1316(e)(1),** shall be used for programs concerned with the improvement of the administration of justice, under the supervision and direction of the **NC IOLTA** Board ~~established under this plan to administer the funds~~ . The board will award grants or non-interest bearing loans under the ~~four~~ categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be ~~utilized shall consist of~~ **awarded** are:

(1) providing civil legal services for indigents;

(2) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(3) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education ~~when otherwise they would not~~ **who would not otherwise** have adequate funds for this purpose;

(4) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

.1316 ~~Severability~~ IOLTA Accounts

~~If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.~~

(a) **Pursuant to order of the North Carolina Supreme Court, every general trust account as defined in the Rules of Professional Conduct maintained by a lawyer or law firm must be an interest-bearing account. Funds deposited in a general, interest-bearing trust account must be available for withdrawal upon request and without delay. For the purposes of these rules, these general, interest-bearing trust accounts shall be known as "IOLTA accounts."**

(b) **Every lawyer must insure that all general trust accounts maintained by the lawyer or law firm are interest bearing.**

(c) **Every lawyer must comply with all the administrative requirements of this rule, including the certification required in Rule .1318 below.**

(d) **Every lawyer or law firm maintaining**

IOLTA accounts shall advise NC IOLTA of the establishment or closing of each IOLTA account. Such notice shall include the name of the bank where the account is established; the name of the account; the bank account number; and the name and bar number of the lawyer(s) in the firm. The North Carolina State Bar shall furnish to each lawyer or law firm maintaining IOLTA accounts a suitable plaque or scroll explaining the program, which plaque or scroll shall be exhibited in the office of the lawyer or law firm.

(e) Every lawyer or law firm maintaining IOLTA accounts shall direct the bank in which an IOLTA account is maintained to:

(1) remit interest or dividends, less any deduction for bank service charges, fees, and taxes collected with respect to the deposited funds, at least quarterly to NC IOLTA at the North Carolina State Bar. If the bank does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed, but only against accrued interest and funds belonging to the law firm or lawyer maintaining the account. Fees for wire transfer, insufficient funds, bad checks, stop payment orders, account reconciliation, negative collected balances, and check printing are business costs or costs billable to others and may not be charged against the interest earned by an IOLTA account.

(2) transmit with each remittance to NC IOLTA at the North Carolina State Bar a statement showing the name of the law firm or lawyer maintaining the account with respect to which the remittance is sent, the earnings period, and the rate of interest applied in computing the remittance; and

(3) transmit to the law firm or lawyer maintaining the account at the same time a report showing the amount remitted to NC IOLTA at the North Carolina State Bar, the earnings period, and the rate of interest applied in computing the remittance.

.1317 Confidentiality

(a) As used in this rule, "confidential information" means all information regarding IOLTA account(s) other than (1) a lawyer's or law firm's status as a participant, former participant, or non-participant in NC IOLTA, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to NC IOLTA, and the total amount of service charges imposed by such bank upon such accounts.

(b) Confidential information shall not be disclosed by the staff or trustees of NC IOLTA to any person or entity, except that confidential information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer or law firm; or (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

.1318 Certification

Every lawyer admitted to practice in North Carolina shall certify annually on or before June 30 to the North Carolina State Bar that all general trust accounts maintained by the lawyer or his or her law firm in North Carolina are established and maintained as IOLTA accounts or that the lawyer is exempt from this provision because he or she does not maintain any general trust account(s) in North Carolina.

.1319 Noncompliance

A lawyer's failure to comply with the mandatory provisions of this subchapter shall be reported to the Administrative Committee which may initiate proceedings to suspend administratively the lawyer's active membership status and eligibility to practice law pursuant to Rule .0903 of this subchapter.

.1320 Severability

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Rules of Professional Conduct—Rule 1.15-2 General Rules

(a) ....

(b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer. Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term. General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Sections .1300-.1320.

...

Comment [following Rule 1.15-3]

[1] ....

Client Property

[3] Every lawyer who receives funds belonging to a client must maintain a trust account. The general rule is that every receipt of money from a client or for a client, which will be used or delivered on the client's behalf, is held in trust and should be placed in the trust account. All client money received by a lawyer, except that to which the lawyer is immediately entitled, must be deposited in a trust account, including funds for payment of future fees and expenses. Client funds must be promptly deposited into the trust account. Client funds must be deposited in a general trust account if there is no duty to invest on behalf of the client. Generally speaking, if a reasonably prudent person would conclude

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Ethics Committee Proposes Opinion on Advertising Listing in *NC Super Lawyers*

Council Actions

At a meeting on October 19, 2007, the State Bar Council adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2007 Formal Ethics Opinion 1

Duty to Heirs when Filing Wrongful Death Action

Opinion rules that a lawyer owes no ethical duty to the heirs of an estate that he represents in a wrongful death action except as set forth in Rule 4.4.

2007 Formal Ethics Opinion 2

Taking Possession of Client's Contraband

Opinion rules that a lawyer may not take possession of a client's contraband if possession is itself a crime and, unless there is an exception allowing disclosure of confidential information, the lawyer may not disclose confidential information relative to the contraband.

The council voted against adoption of proposed 2007 Formal Ethics Opinion 12, *Outsourcing Legal Support Services to a Foreign Country*, and voted in favor of referring the issues presented in the proposed opinion back to the Ethics Committee for further study.

Ethics Committee Actions

At its meeting on October 18, 2007, the Ethics Committee agreed that the first inquiry and opinion in Proposed 2007 FEO 10, *Roles of School Board Lawyers in Administrative Proceedings*, should be severed and studied further by a subcommittee and the second inquiry and opinion should be revised and published for comment. If revisions are approved by the committee at a future meeting, the first inquiry and opinion will be published in a new, distinct formal ethics opinion. The following three proposed opinions were also revised by the committee and are republished below for comment: Proposed 2006 Formal Ethics Opinion 3, *Representation in Purchase of Foreclosed Property*, Proposed 2007 Formal Ethics Opinion 4, *Solicitation after Seminar, Gifts to Clients and Others, and Distribution of Business Cards*; and Proposed 2007 Formal Ethics Opinion 13, *Billing at Hourly Rate for Intra-Office Communications*. Three new proposed opinions are also published for comment. The comments of readers are welcomed.

Proposed 2006 Formal Ethics Opinion 3
Representation in Purchase of Foreclosed Property
October 18, 2007

Proposed opinion rules that a lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

Inquiry #1:

Seller (a financial institution) acquires property as a result of the foreclosure by execution of the power of sale contained in a deed of trust securing its own note or a note that it was servicing. Client X entered into a contract with Seller to buy the property that was repossessed via foreclosure.

Attorney A regularly handles foreclosure proceedings for Seller either serving as the trustee or as the lawyer for the trustee (both roles are referred to herein as the "foreclosure lawyer"). In the current proceeding, Attorney A served as the foreclosure lawyer.

Client X would like Attorney A to close the sale. May Attorney A represent both Client X and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Client X?

Opinion #1:

Yes, provided there is full disclosure to Client X of all potential risks and Client X gives informed consent. Multiple representation of parties to a real estate closing is allowed in RPC 210 and in 97 FEO 8. The latter opinion holds that a lawyer who regularly represents a real estate developer may represent the buyer and the developer in the closing of residential real estate. Rule 1.7 permits multiple representation notwithstanding the existence of a concurrent conflict of interest if the lawyer concludes that he or she can provide competent and diligent representation to each affected client and the clients give informed consent which is confirmed in writing. If Attorney A concludes that, under the circumstances, he can still exercise independent, professional judgment on behalf of all of the parties to the closing, he may seek the informed consent Client X.

Obtaining the informed consent of the buyer in this situation means that the buyer must be advised of the potential risks to a purchaser of property that was previously foreclosed including the distinctions between marketable and insurable title and between a non-warranty and a warranty deed. The buyer must also be advised of his potential liability for homeowners' association dues. Most importantly, the lawyer must disclose his prior participation in the foreclosure and explain that the lawyer must examine his own work on the foreclosure to certify title to the property.

Attorney A may represent all of the parties to the closing even if Client X procures financing to purchase the property (including financing provided by Seller). Attorney A must be able fully to explain, without objection from the lender/seller, the loan documents, setting forth the terms of repayment (and potentially including a balloon payment and/or prepayment penalty), and the status of title including any material exceptions between the lender's and owner's title insurance policies.

If Client X consents to the representation, Attorney A may proceed unless and until it becomes apparent that he cannot manage the potential conflict between the interests of the lender/seller and the buyer. If the lawyer determines that he can no longer exercise his inde-

pendent professional judgment on behalf of both clients, he must withdraw from the representation of both clients.

Inquiry #2:

Under the facts of Inquiry #1, the contract signed by Client X provides that Seller will select the title and closing agent. However, the contract specifies that the buyer is also entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Client X.

May Attorney A represent both Client X and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Client X?

Opinion #2:

No. Under these circumstances, it is apparent that it is in Attorney A's personal financial interest to preserve and protect his relationship with Seller. This self-interest will impair Attorney A's independent professional judgment and his ability to be objective and impartial when making the disclosures necessary to obtain informed consent from Client X. Therefore, Attorney A may not seek the informed consent of Client X and may not represent Client X in the closing.

Inquiry #3:

Under the facts of Inquiry #2, Attorney B regularly represents Seller on various matters but did not represent the trustee on the foreclosure of the subject property and did not act as trustee. May Attorney B represent both Client X and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Client X?

Opinion #3:

Yes, Attorney B may represent both parties to the transaction but only upon satisfaction of the following conditions: Attorney B reasonably believes that the common representation will not be adverse to the interests of either client; there is full disclosure of Attorney B's prior representation and relationship with Seller; Attorney B reasonably believes that he can exercise independent professional judgment on behalf of Client X including explaining to Client X the provisions of the purchase contract and the distinction between a lawyer's opinion on title and title insurance; and Client X consents to the representation. Rule 1.7; 97 FEO 8.

Inquiry #4:

Under the facts of Inquiry #2, Attorney A intends to represent only the interests of Seller and does not intend to represent Client X in closing the transaction. May Attorney A limit his representation in this manner?

Opinion #4:

Yes, Attorney A may limit his representation to Seller. However, if he does so, in light of the provisions of the purchase contract, it is possible that Client X will be misled about Attorney A's role. Therefore, Attorney A must fully disclose to Client X that Seller is his sole client, he does not represent the interests of Client X, the closing documents will be prepared consistent with the specifications in the contract to purchase, and, in the absence of such specifications, he will prepare the documents in a manner that will protect the interests of his client, Seller, and, therefore, Client X may wish to obtain his own lawyer. *See, e.g.*, RPC 40 (disclosure must be far enough in advance of the closing that the buyer can procure his own counsel), RPC 210, 04 FEO 10, and Rule 4.3(a). Because of the strong potential for Client X to be misled, the disclosure must be thorough and robust.

Inquiry #5:

Under the facts of Inquiry #4, if Attorney A limits his representation to Seller, but closes the transaction, does he have any duty to disclose or discuss any of the following with Client X: defects of title; the difference between insurable title and marketable title; the exceptions contained in the title policy and the need for exception documents at closing; and the terms of the sales contract?

Opinion #5:

If Attorney A explicitly limits his representation to Seller, he cannot give any legal advice to Client X except the advice to secure counsel. Rule 4.3(a). In light of the significant issues involved for Client X, Attorney A should advise Client X to obtain his own lawyer.

Inquiry #6:

Under the facts of Inquiry #4, Attorney A closes the transaction. The contract required the buyer to pay the closing agent's "customary closing fee;" therefore, Client X pays a fee to Attorney A as the title/closing agent. Subsequently, a defect of title caused by Seller is discovered. May Attorney A be held liable to Client X for malpractice?

Opinion #6:

This is a legal question that is outside the purview of the Ethics Committee.

Inquiry #7:

Under the facts of Inquiry #1, the contract to buy the property signed by Client X contains the following conditions: Seller will select the title and closing agent; Seller will pay the title examination fee and the premium for the owner's title insurance policy; the buyer will pay the title/closing agent's "customary closing fee;" and all closing transactions will be held at the title/closing agent's office. The contract specifies that the buyer is entitled to legal representation at the buyer's own expense. Seller names Attorney A as the "title/closing agent" for the sale to Client X.

May Attorney A represent both Client X and Seller on the closing of the transaction, including examining title and giving an opinion as to title to Client X?

Inquiry #7:

No, see Opinion #2 above.

Inquiry # 8:

Under the facts of Inquiries #2, 3, and 4, Client X asks Attorney Y to represent him on the closing of the purchase of the property. Client X wants Attorney Y to examine the title to the property, give his opinion as to title, and act as Client X's agent at the closing.

Attorney A insists that the contract requires Client X to accept him as the closing agent for the transaction even if he only represents Seller. May Attorney A refuse to allow Attorney Y to participate in the closing as Client X's lawyer?

Opinion #8:

No. Clients are entitled to legal counsel of their choice. *See, e.g.*, RPC 48. A lawyer may not participate in any scheme or contract that states or implies that a party to the transaction does not have the right to obtain independent legal counsel to represent his interests. Drafting such a provision for a client or agreeing to provide representation pursuant to such a provision is unethical because the provision will chill the buyer's right to independent legal counsel even if the enforceability of the provision is doubtful.

Attorney A may, by the terms of the purchase agreement, be the designated closing agent for the sale. However, if Client X hires a lawyer to represent his interests by examining and giving him an opinion on title and partic-

ipating in the closing on his behalf, the other lawyer may not interfere with this representation. *See, e.g.,* Rule 4.2. In addition, Attorney A must comply with the prohibition in Rule 4.2(a) on direct communications with a represented person without the consent of the lawyer for the represented person. If Client X chooses to obtain his own lawyer, Attorney A shall cede the closing responsibilities to the lawyer for the buyer consistent with North Carolina custom and practice in real estate closings.

Inquiry #9:

Under the facts of Inquiries #2, 3, and 4, Attorney A agrees that Attorney Y will represent Client X's interests at the closing. However, Attorney A claims that he is still entitled to a fee from Client X because the terms of the contract.

May the legal fee for Attorney A's representation of Seller be charged to Client X?

Opinion #9:

Whether the contract to purchase the property requires Client X to pay Attorney A's fee for representation of Seller is a legal question outside the purview of the Ethics Committee. However, a lawyer may be paid by a third party, including an opposing party, provided the lawyer complies with Rule 1.8(f) and the fee is not illegal or clearly excessive in violation of Rule 1.5(a). *See* RPC 196. Attorney A's time and labor relative to the closing may be reduced because of the legal services performed by Attorney Y on behalf of Client X. If so, this fact should be taken into account in determining whether the "customary fee" for closing the transaction is excessive and an appropriate reduction in the fee should be made. Rule 1.5(a). Because Client X is represented by Attorney Y, Attorney A may not charge or collect any money for representing Client X.

Inquiry #10:

A realtor prepared the purchase contract. It alters the usual closing arrangements, waives many "normal" rights of a buyer, and favors the seller by allowing the seller to terminate the contract for any reason and return the deposit without further liability. Is the realtor engaged in the unauthorized practice of law when preparing the contract? Does it matter whether the realtor is a buyer's agent, a seller's agent, or a dual agent? Does it matter whether the seller and the buyer have different realtors? Is consumer protection legislation needed?

Opinion #10:

These questions do not relate to the professional responsibilities of lawyers and cannot be answered by the Ethics Committee.

Proposed 2007 Formal Ethics Opinion 4
Solicitation after Seminar, Gifts to Clients and Others, and Distribution of Business Cards
October 18, 2007

Proposed opinion provides guidance on miscellaneous issues relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements.

Inquiry #1:

May an attorney advertise and conduct educational seminars for non-clients and, at the end of the presentation, request that the attendees complete an evaluation feedback form which includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest and a desire, or not, for a free, personal consultation?

Opinion #1:

An attorney may conduct educational seminars for non-clients. *See* RPC 36. The attorney may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. *See* Rule 7.2. The attorney may request attendees to complete an evaluation feedback form that includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest. After the seminar, the attorney may not contact an attendee by in-person or telephone solicitation but must wait for the attendee to contact the attorney. Rule 7.3(a).

Inquiry #2:

May an attorney host a purely social, non-education function for clients and non-clients, including allied professionals, at no charge to them, who have referred prospective business to the attorney?

Opinion #2:

An attorney may host a social function for existing clients. *See* RPC 146. The attorney may invite non-clients, so long as the attorney does not solicit business from the non-clients.

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, prior to the next meeting of the committee in January 2008.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Inquiry #3:

May an attorney send a restaurant or store gift certificate to a client or non-client in appreciation for a referral from that person?

Opinion #3:

No. Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services.

Inquiry #4:

May an attorney send holiday fruit baskets, meats, cheese, nuts, or sweets to existing clients?

Opinion #4:

Yes, as long as a gift is not a quid pro quo for the referral of clients. Rule 7.2(b).

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

Inquiry #5:

If a client, non-client, fellow attorney, or allied professional requests one or more business cards or firm brochures from an attorney, may the attorney oblige the request?

Opinion #5:

Yes. The potential for abuse or overreaching is not present where an attorney gives multiple cards or brochures to a third party if there is no understanding that the recipient will engage in in-person solicitation on the attorney's behalf. Rule 7.3.

2006 FEO 7 is distinguishable because it deals with the distribution of business cards at a meeting of a for-profit networking organization whose stated purpose is to provide referrals to its members.

Inquiry #6:

Along with a thank-you letter from the attorney to a client for the client's having allowed the attorney to provide services to that client, may the attorney include a business card and/or firm brochure with the suggestion that the client, if so willing, pass it along to someone who the client thinks might need similar services?

Opinion #6:

Yes, so long as there is no incentive for the client to engage in in-person solicitation on the attorney's behalf. 2006 FEO 7 is distinguishable because it deals with members of a for-profit networking organization rather than a former client.

Inquiry #7:

At the conclusion of rendering services to the client, assume the attorney includes with a thank-you letter a "report card" form for the client to return, if so willing, indicating the client's level of satisfaction with various aspects of the attorney-client experience. If the client chooses to make favorable comments about the attorney or services and expressly consents to the use of those comments for the attorney's marketing purposes, may the attorney use those testimonials in any of its advertising media?

Opinion #7:

With the clients' consent, an attorney may use client endorsements if the clients' statements are truthful "soft" endorsements of the attorney's services that do not create unjustified expectations about the results that the attorney can achieve. A soft endorsement describes characteristics of the lawyer's client service and does not describe the results that the lawyer achieved for the client.

Inquiry #8:

If the attorney's office is in North Carolina but the attorney is also licensed to practice in or for clients in another state, and something is expressly allowed ethically by the other state but prohibited in North Carolina, is the attorney subject to discipline in North Carolina?

Opinion #8:

Yes, if the conduct is unethical under the North Carolina Rules of Professional Conduct and the lawyer's conduct occurred in North Carolina or the predominant effect of the conduct is in North Carolina. Rule 8.5(b)

Inquiry #9:

If any of the foregoing activities are prohibited, which ones must be reported to the State Bar pursuant to Rule 8.3?

Opinion #9:

As stated in Rule 8.3, a violation of the Rules of Professional Conduct that raises a *substantial* question about a lawyer's honesty, trustworthiness, or fitness must be reported to the State Bar.

Proposed 2007 Formal Ethics Opinion 10
Lawyer Employed by School Board as Hearing Officer
October 18, 2007

Proposed opinion holds a lawyer employed by a school board may serve as an administrative hearing officer with the informed consent of the board.

Inquiry:

Before a decision to suspend or expel a student is made by the administration of a public school system, a student is afforded a hearing before an administrative hearing officer who makes findings of fact, conclusions of law, and a recommendation on discipline to the superintendent. These suspension and expulsion hearings precede an appeal to the board.

School Board hires Lawyer X as an employee to provide in-house legal services to the administration of the school system and to the board. As a part of her duties, Lawyer X is appointed by the superintendent as the administrative hearing officer for the initial suspension and expulsion hearings.

May Lawyer X serve in this capacity?

Opinion:

This opinion assumes that there are no due process prohibitions to the arrangement described in this inquiry. To the extent that this arrangement is held by a court to interfere with the due process rights of students, a lawyer may not participate.

Competent representation demands that the lawyer maintain her neutrality and act impartially when serving as a hearing officer to fulfill the board's obligation to provide a fair hearing and to avoid exposing her employer to subsequent hearings or liability. If Lawyer X reasonably believes that she will be able to provide competent and diligent representation to the board while serving in the capacity of hearing officer, she may accept the assignment provided the board gives informed consent, confirmed in writing. Rule 1.7(b). The lawyer's service as the administrative hearing officer may create an appearance of unfairness. Therefore, the disclosure necessary to obtain the informed consent of the board must include warning the board about the appearance problem, advising the board about the practical legal effects of the problem, and advising the board that the problem could be avoided by retaining an independent lawyer, who is not an employee of the board, to serve as the hearing officer. If the board consents after this disclosure, Lawyer X may serve as the hearing officer. Thereafter, Lawyer X must continually reassess her ability to fulfill her obligation to maintain her neutrality as a hearing officer as her relationship with the board and the administration changes over time.

This situation is not governed by Rule 1.12(b) which prohibits a lawyer who is serving as a judge or other adjudicative officer

from negotiating for employment with a person who is involved as a party in a matter before the lawyer. Lawyer X is already employed by the board; her decisions as the hearing officer will not be influenced by offers of employment. Similarly, RPC 138 is not applicable. That opinion cites Canon IX of the now superseded 1985 Rules of Professional Conduct as the basis for prohibiting a partner of a lawyer representing a party to an arbitration hearing from acting as an arbitrator. Canon IX set forth the general admonition that "A lawyer should avoid even the appearance of professional impropriety." The canons did not establish specific standards or provide clear guidance for lawyer conduct and, for these reasons, were eliminated from the Rules of Professional Conduct when they were comprehensively revised in 1997. Mine, *Executive Summary of the 1997 Revised Rules of Professional Conduct.* RPC 138 prohibits lawyers in the same firm from serving, respectively, as advocate and adjudicator because of the appearance of impropriety. In the present inquiry, the lawyer is serving solely as the hearing officer. Moreover, the potential that there will be an appearance of unfairness in the proceeding must be disclosed to the board, as explained above, but, if the lawyer concludes that she can perform the role competently, which includes acting impartially, and the board consents, there is no professional impropriety.

Rule 1.12(a) prohibits a lawyer from representing anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer unless all parties to the proceeding give informed consent confirmed in writing. Therefore, Lawyer X may not subsequently act as the advisor to the board or the prosecutor for the administration in an appeal to the board, nor may she represent the board in any further appeal of a disciplinary matter in which Lawyer X served as the initial hearing officer, unless all parties give informed consent confirmed in writing.

Proposed 2007 Formal Ethics Opinion 13 Billing at Hourly Rate for Intra-Office Communications October 18, 2007

Proposed opinion rules that, to insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

Inquiry:

Attorney's standard contract for legal services provides that the client will be billed for the lawyer's services on a time-expended basis. Attorney charges $200.00 per hour for his legal services. He bills his paralegal's time at $75.00 per hour and his secretary's time at $50.00 per hour. Intra-office email communications are typically billed to clients in the following manner: Attorney A bills for the time that it takes him to type and send an email to a member of the staff; the staff member (secretary or paralegal) bills for the time expended reading Attorney's email and responding; Attorney bills for the time he spends reading the responsive email. Over the course of several months, the charges to a client for intra-office email communications may be in the hundreds of dollars. May a lawyer bill for both the time that it takes the drafter to write an email and the time that it takes the recipient in the same office to read the same email?

Opinion:

Yes. A lawyer may bill for intra-office communications about a client's matter. For example, a lawyer and a paralegal (or two or more lawyers) who meet to discuss a client's case may both bill for the time expended in the meeting provided the meeting advances the representation of the client and the participation of both billing staff members is necessary. Email communications to instruct, update, or confer with other members of the firm is no different and, on occasion, may involve the expenditure of less time by the participants than an in-person meeting (and, therefore, be less expensive for the client). Nevertheless, to insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive.

Establishing a Reasonable Hourly Rate for Services

Rule 1.5 prohibits a lawyer from charging or collecting a clearly excessive fee. The rule includes a non-exclusive list of factors to be considered in determining whether a fee is clearly excessive, including the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the fee customarily charged in the locality for similar legal services;

(3) the amount involved and the results obtained; and

(4) the experience, reputation, and ability of the lawyer or lawyers performing the services. Rule 1.5(a).

The prohibition on charging an excessive fee also applies to the amount charged per hour. When establishing an hourly rate for a lawyer's time or for a staff member's time, the factors set forth in the rule must be considered. In particular, the experience, reputation, and ability of the lawyer or staff member performing the services must be honestly evaluated. If the lawyer or staff member is inexperienced or of modest ability, the hourly rate should so reflect.

With regard to establishing hourly rates for staff members, if a lawyer's hourly rate takes into consideration overhead costs for staff, the lawyer must consider whether the work of a particular staff member advances the legal representation of the client or is so derivative of the lawyer's work that the expense should be subsumed in the lawyer's hourly rate. For example, the services of a typist, filing clerk, receptionist, scheduler, or billing clerk may fall into the latter category.

Disclosing the Basis for the Amounts to be Charged

Rule 1.5(b) provides that "[w]hen the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." Although not required by the rule, a written memorandum of the fee arrangement with each client is strongly encouraged particularly when there is the possibility that the client does not understand that hourly charges may include charges for time expended communicating with, instructing, and supervising others, by email communications and otherwise. As noted in the comment to the rule,

> [g]enerally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general

nature of the legal services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

See also Rule 1.4(b) (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). When a particular billing practice may be a subsequent source of misunderstanding, a lawyer should consider disclosing this billing practice at the beginning of the representation and including an explanation in the fee memorandum.

The duty to disclose the basis for the amounts to be charged is "a two-fold duty, including not only an explanation at the beginning of engagement of the basis on which fees and other charges will be billed, but also a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993). "In an engagement in which the client has agreed to compensate the lawyer on the basis of time expended at regular hourly rates, a bill setting out no more than a total dollar figure for unidentified professional services will often be insufficient to tell the client what he or she needs to know in order to understand how the amount was determined." *Id.* Gerald F. Phillips in *Time Bandits: Attempts by Lawyers to Pad Hours Can Often Be Uncovered by a Careful Examination of Billing Statements*, 29 W. St. U. L. Rev. 265 (2002), suggests that a lawyer has a duty to disclose the hourly rates of each timekeeper in each billing statement "so that the client may reasonably understand what fee is being billed and how it was calculated." *Id.* at 274.

Avoiding Wasteful, Unnecessary, or Redundant Procedures

The fiduciary character of the client-lawyer relationship requires a lawyer to act in the client's best interests and to deal fairly with the client. When billing on an hourly basis, fair dealing requires that the lawyer provide an hour's worth of legal services for each hour billed. This means that a lawyer must avoid wasteful, unnecessary, or redundant procedures that do not serve to advance the client's representation. Time padding, or billing a client for time that was not actually expended on a client's matter, and task padding, or billing a client for unnecessary tasks, are both dishonest and unethical. Phillips at 267; Rule 7.1 and Rule 8.4(c). The comment to Rule 1.5 admonishes, "[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." As further noted in ABA Formal Op. 93-379,

> continuous toil on or over-staffing a project for the purpose of churning out hours is...not properly considered "earning" one's fees. One job of a lawyer is to expedite the legal process. Model Rule 3.2. Just as a lawyer is expected to discharge a matter on summary judgment rather then proceed to trial if possible, so too is the lawyer expected to complete other projects for a client efficiently.

Whether a bill for intra-office communications or consultations, by email, telephone, or meeting, constitutes task padding or is a fair charge for a service rendered must be evaluated on a case-by-case basis.

Total Cost to the Client May Not Be Clearly Excessive

Rule 1.5 "deals not only with the determination of a reasonable hourly rate, but also with total cost to the client." ABA Formal Op. 93-379. In light of all services rendered and the factors set forth in Rule 1.5(a), the total cost to the client, on whatever basis charged, must not be clearly excessive. If the inclusion of charges at a lawyer's or a staff member's hourly rate for giving or receiving instructions via intra-office email or otherwise renders the total cost to the client clearly excessive, a lawyer should exclude these charges from the client's bill.

Proposed 2007 Formal Ethics Opinion 14
Advertising Inclusion in List in *North Carolina Super Lawyers* and Other Similar Publications
October 18, 2007

Proposed opinion rules a lawyer may advertise the lawyer's inclusion in the list of lawyers in North Carolina Super Lawyers *and other similar publications and may advertise in such publications subject to certain conditions*

Inquiry #1:

North Carolina Super Lawyers is a listing of lawyers published by Key Professional Media, Inc., a for-profit corporation, as a special advertising supplement in North Carolina newspapers and city and regional magazines. It is also published as a magazine and distributed to all active members of the State Bar, corporate counsel of Russell 3000 companies, and libraries of ABA-approved North Carolina law schools.

The selection process for inclusion in an edition of *North Carolina Super Lawyers* is described on the *Super Lawyers* website (www.superlawyers.com/about/opinion_39.html) as a "very thorough quantitative and qualitative selection process" that is based upon three steps: creation of the candidate pool, evaluation of the lawyers in the pool, and peer evaluation by practice area. The process, as described on the website and in the advertising supplements and the magazine, involves the following activities and includes the following standards:

- An annual ballot to all active lawyers in North Carolina who are licensed for five years or more with procedures and systems to detect and manage manipulation attempts.
- An annual search during which Law & Politics, a division of Key Professional Media, Inc., seeks out candidates who should be considered but have not been identified through the balloting process. This search includes the use of professional databases and sources, the review of local and national legal journals, and interviews with managing partners and marketing directors of law firms in North Carolina.
- Law & Politics examines the background and experience of each candidate, searching for evidence of peer recognition and professional achievement.
- Candidates are grouped by primary area of practice and reviewed by lawyers with demonstrated expertise in the relevant practice areas.
- Research by Law & Politics during which each candidate is scored on a 12-point evaluation of peer recognition and professional achievement.
- Lawyers selected for inclusion in *Super Lawyers* are checked for their standing with the bar, including verification that they are not subject to disciplinary proceedings, criminal prosecution, or other legal action that reflects adversely on fitness.
- Lawyers cannot pay to be selected for inclusion in *Super Lawyers*; they cannot vote for themselves; and they cannot pay to be editorially featured.
- Lawyers are not included or excluded depending upon whether they advertise in

Super Lawyers. Every lawyer named in the *Super Lawyers* list receives a free listing in the *Super Lawyers* advertising supplement or magazine.

- Inclusion in a *Super Lawyers* list is limited to the top five percent of the active members of the State Bar based upon points awarded pursuant to the process described above.

The *Super Lawyers* website also explains the "advertising opportunities" that are available in *Super Lawyers* advertising supplements or magazines. There are two "profile" options for advertising in the supplement or the magazine. A standard profile is a one-ninth of a page advertisement that includes a color photo, contact information, and 100-word biography for the profiled lawyer. A platinum profile is a full or half-page advertisement that focuses on an individual lawyer or all lawyers chosen for the *Super Lawyers* list from a law firm. It also includes a color photo, contact information, and biographies of the profiled lawyers. In the alphabetical listing in the supplement or magazine, the names of lawyers who have purchased a "profile" advertisement are listed in red boldface type instead of the black type used for the other lawyers on the list.

In addition to the profiles, a lawyer or law firm may purchase a display advertisement within and adjacent to the *Super Lawyers* listing in the supplement or magazine. These display advertisements may be full, half, or quarter-page advertisements. Usually a display advertisement purchased by a law firm congratulates the lawyers with the firm who are included in the *Super Lawyers* list.

May North Carolina lawyers listed in *North Carolina Super Lawyers*, or other similar publications with titles that imply that the lawyers listed in the publication are "super." "the best." "elite." or a similar designation, advertise or publicize that fact?

Opinion #1:

Yes, subject to certain conditions.

Rule 7.1(a) prohibits a lawyer from making false or misleading communications about himself or his services. The rule defines a false or misleading communication as a communication that contains a material misrepresentation or fact of law or omits a necessary fact; one that is likely to create an unjustified expectation about results the lawyer can achieve; or one that compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated. The question is whether advertising one's inclusion in the *Super Lawyers* list is a material misrepresentation because the term "super" creates the unjustified expectation that the lawyer can achieve results that an ordinary lawyer cannot or, by implying superiority, compares lawyer's services with the services of other "inferior" lawyers without factual substantiation.

Rule 7.1 derives from a long line of Supreme Court cases holding that lawyer advertising is commercial speech that is protected by the First Amendment and subject to limited state regulation. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court first declared that First Amendment protection extends to lawyer advertising as a form of commercial speech. The Court held that a state may not constitutionally prohibit a lawyer's advertisement for fees for routine legal services although it may prohibit commercial expression that is false, deceptive, or misleading and may impose reasonable restrictions as to time, place, and manner. Subsequent Supreme Court opinions clarified that the commercial speech doctrine set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980) is applicable to lawyer advertising. *See In re R.M.J.*, 455 U.S. 191 (1982). Specifically, a state may absolutely prohibit inherently misleading speech or speech that has been proven to be misleading; however, other restrictions are appropriate only where they serve a substantial state interest, directly advance that interest, and are no more restrictive than reasonably necessary to serve that interest.

Seventeen years after *Bates*, in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), a plurality of the Supreme Court concluded that a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA). The Court found NBTA to be a "bona fide organization," with "objectively clear" standards, which had made inquiry into Peel's fitness for certification and which had not "issued certificates indiscriminately for a price." *Id.* at 102, 110. If a state is concerned that a lawyer's claim to certification may be a sham, the state can require the lawyer "to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of the law." *Id.* at 109. In concluding that the NBTA certification advertised by Peel in his letterhead was neither actually nor potentially misleading, the Court emphasized "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information." *Id.* at 108.

Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy, 512 U.S. 136 (1994), similarly held that a state may not prohibit a CPA from advertising her credential as a "Certified Financial Planner" (CFP) where that designation was obtained from a private organization. As in *Peel*, the Court found that a state may not ban statements that are not actually or inherently misleading such as a statement of certification, including the CFP designation, by a "bona fide organization." *Id.* at 145. The Court dismissed concerns that a consumer will be mislead because he or she cannot verify the accuracy or value of the designation by observing that a consumer may call the CFP Board of Standards to obtain this information. *Id.*

In 2003 FEO 3, the Ethics Committee considered whether a lawyer may advertise that he or she is a member of an organization with a self-laudatory title such as the "Million Dollar Advocates Forum." The opinion rules that a lawyer may advertise such membership but, to avoid a misleading communication, the following conditions must be satisfied:

1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership;

2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement;

3) the organization has no financial interest in promoting the particular lawyer; and

4) the organization charges the lawyer only reasonable membership fees.

Super Lawyers appears to be a bona fide organization, as described in *Peel* and *Ibanez*, in that it has objectively clear and consistently applied standards for inclusion in its lists and

inclusion is available to all lawyers who meet the standards. For example, all active North Carolina lawyers who are licensed for five years or more are eligible for inclusion and inclusion is limited to the top five percent of eligible lawyers based upon an objective point system.

As observed by the Supreme Court in *Peel*, Peel's advertisement of his certification by NBTA "is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." *Peel*, 496 U.S. at 101. Similarly, advertising inclusion in the *Super Lawyers* list is not an opinion on the quality of a listed lawyer's work or a promise of success, it is information from which a consumer may draw inferences based upon the standards for inclusion in the list. The Ethics Committee therefore concludes that an advertisement that states that a lawyer is included in a listing in *North Carolina Super Lawyers*, or in a similar listing in another publication, is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied; to wit:

1) the publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing;
2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication's website is adequate if the standards are published therein); and
3) no compensation is paid by the lawyer, or the lawyer's firm, for inclusion in the listing.

In addition, the advertisement must make clear that the lawyer is included in a listing that appears in a publication which is identified (by using a distinctive typeface or italics) and may not simply state that the lawyer is a "Super Lawyer." A statement that the lawyer is a "Super Lawyer," without more, implies superiority to other lawyers and is an unsubstantiated comparison prohibited by Rule 7.1(a). Finally, since a new listing is included in each annual edition of the *Super Lawyers* supplement and magazine (and, it is presumed, in other similar publications), the advertisement must indicate the year in which the lawyer was included in the list.

Inquiry #2:

May a North Carolina lawyer purchase a profile or display advertisement in a *North Carolina Super Lawyers* advertising supplement or magazine or in other similar publications?

Opinion #2:

Yes, subject to the conditions set forth in Opinion #1. If the standards for inclusion in the listing are published in the supplement or the magazine, the advertisement does not have to include information on how to obtain the standards.

Inquiry #3:

May a North Carolina lawyer participate in the selection process for the lawyers who are included in such publications?

Opinion #3:

Yes, provided the lawyer's recommendations and evaluations of other lawyers are founded on knowledge and experience of the other lawyers, truthful, and not provided in exchange for a recommendation from another lawyer.

Proposed 2007 Formal Ethics Opinion 15 Clarification of the Requirements for Targeted Direct Mail October 18, 2007

Proposed opinion provides clarification of the technical requirements for targeted direct mail letters set forth in Rule 7.3(c) of the Rules of Professional Conduct.

Inquiry #1:

Rule 7.3(c) allows a lawyer to solicit professional employment from a potential client known to be in need of legal services by written, recorded, or electronic communication provided the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) appears on a specified part of the communication. If the solicitation is by letter, Rule 7.3(c)(1) requires the advertising notice to "be printed at the beginning of the body of the letter in a font as large or larger than the lawyer's or law firm's name in the letterhead or masthead." Where must the advertising notice be placed in the letter to be "at the beginning of the body of the letter?"

Opinion #1:

Black's Law Dictionary, 5th Edition (1979), defines "[b]ody of an instrument" as follows: "The main and operative part; the substantive provisions, as distinguished from the recitals, title, jurat, etc." Consistent with this definition, the body of a letter is that part of the letter that appears below the salutation. However, the Rules of Professional Conduct, being rules of reason, should be interpreted and applied in a reasonable manner. Rule 0.2, *Scope*, cmt. [1]. Therefore, the requirement in Rule 7.3(c) that the advertising notice "be printed at the beginning of the body of the letter" is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter.

Inquiry #2:

Rule 7.3(c)(1) requires direct mail letters to potential clients to be placed in an envelope. The advertising notice must be printed on the front of the envelope, in a font that is as large as any other printing on the envelope, and the front of the envelope "shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice." Many law firms have designed a distinguishing sign or mark ("insignia") or special border that is used in conjunction with the firm's name wherever and whenever the firm name appears in print on official written communications on behalf of the firm such as letterhead. Examples of such insignia include a stylized version of the scales of justice or the surname initials of the named partners in a distinct enlarged font. May the front of the envelope for a direct mail letter contain an insignia or border connected with the firm name in the return address on the envelope if the insignia is a picture or symbol but does not contain any letters or printing?

Opinion #2:

Yes, if the insignia or border is used consistently by the firm in official communications on behalf of the firm, the insignia or border is considered a part of the firm name and may appear next to the firm name in the return address on the front of the envelope provided the advertising notice remains

conspicuous.

Inquiry #3:

May the front of the envelope for a direct mail letter contain an insignia connected with the firm name in the return address on the front of the envelope if the insignia is a design that incorporates the surname initials of the named partners of the firm? If so, do the initials have to be in a font that is the same size or smaller than the advertising notice printed on the front of the envelope?

Opinion #3:

If the insignia is used consistently by the firm in official communications on behalf of the firm and the initials are in a font that is the same size or smaller than the advertising notice, the insignia may appear next to the firm name in the return address on the front of the envelope. The font size requirement in Rule 7.3(c) must be satisfied to insure that the advertising notice remains conspicuous.

Inquiry #4:

May an insignia appear on the back of the envelope and, if so, are there any restrictions on the size?

Opinion #4:

The insignia may appear on the back of the envelope subject to the requirements set forth in opinions #2 and #3 above.

Inquiry #5:

ABC Law Firm uses the motto "Attorneys for Injured People" and prints the motto just below its name in all of its official written communications. May the front of the envelope for a direct mail letter contain a motto connected with the law firm name in the return address on the envelope?

Opinion #5:

No. A motto will detract from the conspicuousness of the advertising notice. However, the motto may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c).

Inquiry #6:

May the URL or website address for a law firm appear in the return address on the front of the envelope for a direct mail letter?

Opinion #6:

No. It may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c).

Proposed 2007 Formal Ethics Opinion 16
Cross Examination of Law Enforcement Officer by Criminal Defense Lawyer Who is Also Elected Official
October 18, 2007

Proposed opinion rules that a lawyer who serves on a city council or board of county commissioners may represent a criminal defendant in a criminal proceeding in which a law enforcement officer employed by the council or board is a witness who will be cross examined by the lawyer provided the city or county has adopted a form of government that limits the lawyer's influence on employment decisions relative to the officer.

Inquiry #1:

Attorney is a criminal defense lawyer in private practice. He is presently a candidate for city council for City M. The city charter of City M provides for the council-manager form of government pursuant to Chapter 160A, Article 7, Part 2, of the General Statutes. In this form of government, the city manager, who is hired by the city council and serves at its pleasure, has the sole authority to hire, fire, promote, or make salary decisions relative to all city officers, department heads, and employees in administrative service (and not elected), except the city attorney. N.C.G.S. 160A-148. The city manager's authority to make employment decisions extends to the chief of police and to all employees of the police department. City M's city charter and local ordinances specify that the city manager, not the city council, is responsible for hiring, firing, and promoting police officers.

RPC 63 and RPC 73 hold that a lawyer who has the potential to influence the salary or employment prospects of a law enforcement officer may not represent criminal defendants in cases in which a law enforcement officer is a witness who must be cross examined by the lawyer. The opinion effectively disqualifies a lawyer who is serving on a governing body, such as the city council, from representing criminal defendants in the judicial district where he serves as a city councilor.

If a lawyer is elected to serve on a city council organized and operated under the council-manager form of government, as described above, in which the lawyer will have no ability directly to influence the salary or employment decisions relative to any law enforcement officer testifying in a criminal case, may the lawyer represent criminal defendants in criminal proceedings in the judicial district where he serves as a city councilor and cross-examine witnesses who are law enforcement officers?

Opinion #1:

Yes. RPC 73 ruled that a lawyer serving on a city council or similar governing board, with authority directly to influence employment decisions relative to government employees, is prohibited from cross-examining law enforcement officers because of "the threat that the law enforcement officer might not feel free to testify truthfully and fully in the face of such an opponent." In the council-manager form of government, the city council and councilors have no direct authority over the salary or employment prospects of any city employee. Therefore, a law enforcement officer's ability to testify truthfully in a criminal case will be unaffected by the defense lawyer's role on the city council.

Inquiry #2:

Chapter 153A, Article 5, Part 2 of the General Statutes provides the counties may adopt the county-manager plan of government in which the county manager is hired by the board of commissioners to serve at its pleasure. Although similar to the council-manager form of government for muncipalities, the county-manager form of government gives the county manager less discretion in employment decisions. The county manager is the chief administrator of county government and appoints, with the approval of the board of commissioners, and suspends or removes all non-elected county officers, employees, and agents. N.C.G.S. 153A-82(1). The county manager is also responsible for preparing position classification and pay plans for county officers and employees for submission to the board of commissioners and for administering the pay plan and any position classification plan in accordance with general policies and directives adopted by the board. N.C.G.S. 153A-92(c).

If a lawyer is elected to serve on a board of commissioners organized and operated under the county manager form of government, as described above, in which the lawyer will have no authority to influence a decision to suspend or remove a law enforce-

ment officer and limited authority to influence the employment and compensation of a law enforcement officer testifying in a criminal case, may the lawyer represent criminal defendants in criminal proceedings in the judicial district where he serves as a county commissioner and cross-examine witnesses who are law enforcement officers?

Opinion #2:

Yes. Although the board of commissioners in a county-manager form of government has more authority over employment decisions including approval of appointments and establishing the pay plan and position classifications, it is doubtful that the limited influence on a law enforcement officer's salary or employment prospects held by the criminal defense lawyer will affect or interfere with the law enforcement officer's duty to testify truthfully. ■

Proposed Amendments (cont.)

that the funds in question, either because they are nominal in amount or are to be held for a short time, could probably not earn sufficient interest to justify the cost of investing, the funds should be deposited in the general trust account. In determining whether there is a duty to invest, a lawyer shall exercise his or her professional judgment in good faith and shall consider the following:

a) The amount of the funds to be deposited;

b) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c) The rates of interest or yield at financial institutions where the funds are to be deposited;

d) The cost of establishing and administering dedicated accounts for the client's benefit, including the service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

e) The capability of financial institutions, lawyers, or law firms to calculate and pay income to individual clients;

f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

When regularly reviewing the trust accounts, the lawyer shall determine whether changed circumstances require further action with respect to the funds of any client. The determination of whether a client's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or breach of professional conduct based on the good faith exercise of such judgment...

Rule 1.15-4, ~~Interest on Lawyers' Trust Accounts~~ [Reserved]

(Deleted in its entirety.)

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments allow for the referral of a grievance to the Chief Justice's Commission on Professionalism when the respondent's conduct does not constitute a violation of the Rules of Professional Conduct but is considered unprofessional. The commission counsels and assists lawyers and judges on ways to improve their professional behavior.

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty

(1) ...;

(21) where it appears that the respondent has acted in an unprofessional manner that does not constitute a violation of the Rules of Professional Conduct, to dismiss a grievance and refer the matter to the Chief Justice's Commission on Professionalism;

[Renumber remaining paragraphs]

.0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty ...

(1) ...;

(13) in its discretion, to refer grievances primarily attributable to respondent's unprofessional conduct that does not constitute a violation of the Rules of Professional Conduct to the Chief Justice's Commission on Professionalism in accordance with Rule .0112(k) of this subchapter.

.0112 Investigations: Initial Determination

(a) ...;

(k) If at any time before a finding of probable cause, the Grievance Committee determines that the alleged misconduct is primarily attributable to the respondent's unprofessional conduct, the committee may refer the matter to the Chief Justice's Commission on Professionalism. The respondent must consent to the referral and must waive any right of confidentiality that the respondent might otherwise have had regarding communications with persons acting under the supervision of the Chief Justice's Commission on Professionalism.

If the respondent successfully completes the lawyer assistance program of the Chief Justice's Commission on Professionalism, the Grievance Committee can consider that as a mitigating factor and may, for good cause shown, dismiss the grievance. If the respondent fails to complete the program or fails to cooperate with the Chief Justice's Commission on Professionalism, the failure will be reported to the chairperson of the Grievance Committee and the investigation of the grievance will resume.

.0107 Counsel: Powers and Duties

The counsel will have the power and duty

(1) ...;

(2) to decline to initiate an investigation, and refer the matter to the Chief Justice's Commission on Professionalism, when the complaint alleges that a member has acted unprofessionally but that conduct does not constitute a violation of the Rules of Professional Conduct;

[Renumber paragraphs (2) and (3)]

(5)~~(4)~~ to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a matter be dismissed with a referral to the Chief Justice's Commission on Professionalism, that a letter of caution, or a letter of warning be issued, or that the Grievance Committee hold a preliminary hearing;

[Renumber remaining paragraphs] ■

State Bar Swears in New Officers


Hankins


McMillan


Weyher

Hankins Installed as President

Charlotte attorney Irvin W. (Hank) Hankins III was installed as president of the North Carolina State Bar. He was sworn in by North Carolina Supreme Court Justice Mark Martin at the State Bar's Annual Meeting on Thursday, October 18, 2007, and officially took office at the conclusion of the council meeting on October 19, 2007.

Hankins earned both his undergraduate and law degrees (with honors) from the University of North Carolina at Chapel Hill. From 1968 to 1972 he served in the United States Navy. Hankins was admitted to the practice of law in 1975. That year he joined the firm now known as Parker, Poe, Adams & Bernstein, LLP. Hankins is general counsel to the firm and served as its managing partner from 1987-2002. He is admitted to practice before the federal district courts in North Carolina, the Fourth Circuit Court of Appeals, and the United States Supreme Court.

Hankins has been a State Bar Councilor representing Judicial District 26 since 1997. He has served on numerous committees and has chaired the Ethics Committee, the Issues Committee, and the Authorized Practice Committee.

In addition to serving on the State Bar Council, Hankins has served as general counsel to the Charlotte Chamber of Commerce, is past-president of the UNC Law Alumni Association, is a member of the Queens University of Charlotte Board of Trustees, and is a member of the North Carolina Association of Defense Attorneys. He is also a member of the Selwyn Avenue Presbyterian Church where he has served as a deacon and an elder. He and his wife, Bobbie, have two daughters and three grandchildren.

McMillan Elected President-Elect

Raleigh attorney John B. McMillan was elected as president-elect of the North Carolina State Bar. He was sworn in by North Carolina Supreme Court Justice Mark Martin at the State Bar's Annual Meeting on Thursday, October 18, 2007, and officially took office at the conclusion of the council meeting on October 19, 2007.

McMillan earned both his BA and JD degrees from the University of North Carolina at Chapel Hill. He was admitted to the practice of law in 1967. That same year he joined the firm at which he still practices—Manning, Fulton & Skinner, PA—where he concentrates on legislative advocacy, administrative law, and general litigation.

McMillan became a State Bar Councilor in 1997 and has chaired the Issues Committee, Legislative Committee, and Grievance Committee. Prior to his election as a councilor, he served on the Disciplinary Hearing Commission and was its chair.

In addition to serving on the State Bar Council, McMillan is a member of the North Carolina Bar Association, Wake County Bar Association, American Bar Association, and the North Carolina Academy of Trial Lawyers. This year he is president of the Law Alumni Association of UNC.

McMillan has received several awards including the Wake County Bar Association's Joseph Branch Professionalism Award and its President's Award. He has also been recognized by Legal Services of North Carolina.

McMillan's civic responsibilities include service upon the North Carolina Clean Water Management Trust Fund's Board of Trustees and the North Carolina Museum of Natural Sciences Board of Directors.

Weyher Elected Vice-President

Raleigh attorney Barbara B. (Bonnie) Weyher was elected as vice-president of the North Carolina State Bar. She was sworn in by North Carolina Supreme Court Justice Mark Martin at the State Bar's Annual Meeting on Thursday, October 18, 2007, and officially took office at the conclusion of the council meeting on October 19, 2007.

Weyher earned both her BA and JD degrees (with honors) from the University of North Carolina at Chapel Hill. She was admitted to the practice of law in 1977.

After beginning her career in a New York City law firm, she returned to North Carolina in 1979 to join the firm of Young, Moore, Henderson & Alvis, PA, in Raleigh. In 1983, she became one of the founding partners of Yates, McLamb & Weyher, LLP. Weyher is also a certified mediator and mediates cases on a regular basis.

Weyher has substantial involvement in local and state bar organizations. She has served as a councilor on the North Carolina State Bar from 1998 through 2006. She chaired the Grievance Committee, Ethics Committee, and the Authorized Practice of Law Committee, and also served on the Executive Committee, Issues Committee, and Publications Committee. Ms. Weyher has chaired (2005-2006) the Litigation Section of the North Carolina Bar Association. She is a past-president of the Wake County Bar Association. She is also a member of the American Bar Association, Defense Research Institute, and North Carolina Association of Defense Attorneys. ■

Client Security Fund Reimburses Victims

At its October 18, 2007, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $122,783.60 to 14 clients who suffered financial losses due to the misconduct of North Carolina lawyers.

The payments authorized were:

1. Awards of $460.00, $375.00 and $9,223.50 to three former clients of John McCormick, formerly of Chapel Hill, North Carolina. The board found that McCormick closed real estate transactions for these clients and failed to make disbursements of items listed on the HUD-1 settlement statements. McCormick was disbarred on April 10, 2007.

2. An award of $64,115.28 to a former client of John Lee of Charlotte, North Carolina. The board found that Lee failed to make a disbursement from his client's real estate closing as listed on the HUD-1 settlement statement. Lee surrendered his license and was disbarred on January 19, 2007.

3. Awards of $200.00 and $225.00 to two former clients of Joseph W. Morton of Jacksonville, North Carolina. The board found that Morton was retained to handle traffic matters for the clients and failed to provide any valuable legal services on their behalf. Morton was disbarred on July 21, 2006.

4. Awards of $22,792.89, $550.19, $10,523.55, $4,550.00, and $6,360.00 to five former clients of Curtis Vaught, formerly of Hickory, North Carolina. The board determined that Vaught's trust account balance was insufficient to pay all of Vaught's clients' obligations due to his dishonest conduct. Vaught committed suicide on March 18, 2007.

5. An award of $2,000.00 to a former client of Walter Johnson of Greensboro, North Carolina. The board found that Johnson was paid a fee by the client's father, and provided no valuable legal services for the client. Johnson was disbarred on January 14, 2005.

6. An award of $800.00 to a former client of David Harris of Elon, North Carolina. The board found that Harris was paid a fee by his client but provided no valuable legal services. Harris was disbarred on April 1, 2006.

7. An award of $608.19 to a former client to D. Scott Turner of Mooresville, North Carolina. The board found that Turner closed a real estate transaction for his client and failed to refund a portion of the closing proceeds. Turner's trust account balance was insufficient to pay all of his clients' obligations. Turner surrendered his license and was disbarred on January 19, 2007. ■

Disciplinary Actions (cont.)

that Ruffin participated in the theft.

Richard E. Steinbronn of Murphy was reprimanded by the Grievance Committee. Steinbronn assisted the Closing Place to engage in the unauthorized practice of law.

Steven E. Philo of Franklin was reprimanded by the Grievance Committee for assisting a franchise of The Closing Place with the unauthorized practice of law.

Donald H. Barton of Brevard was reprimanded for obtaining an *ex parte* order in a custody matter without joining all necessary parties and without providing notice to counsel for the opposing party and for submitting a proposed order to the court which incorrectly asserted that sole custody was awarded to the child's grandparents.

Richard Broadnax of Reidsville was reprimanded by the Grievance Committee for failing to respond to the State Bar's Letter of Notice.

Petitions for Reinstatement

The DHC reinstated **E. Daniels Nelson** to active status. On August 8, 2005, Nelson was transferred to disability inactive status in 05 DHC 12. Nelson remains subject to conditions imposed in the 2005 order.

Transfers to Disability Inactive Status

The DHC transferred **Peter K. Gemborys** of Wilmington to disability inactive status. Gemborys raised the issue of disability during the course of a disciplinary action. This order will remain in force until a hearing is held on the merits of Gemborys' contention.

Other Matters

Amiel J. Rossabi and Emily Jeffords Meister appealed an order entered by the DHC. The court of appeals reversed, concluding that neither Rossabi nor Meister had committed a violation of the Revised Rules of Professional Conduct. On August 20, 2007, the State Bar filed a Notice of Voluntary Dismissal With Prejudice.

The Secretary of the State Bar vacated a DHC order disbarring Cary lawyer **Brent E. Wood**. Wood was disbarred upon his criminal conviction in federal court. The disbarment was vacated when the trial court granted Wood's Motion for Judgment of Acquittal and Motion for New Trial and entered a Judgment of Acquittal. ■

Quick Receives Professionalism Award

Elizabeth L. Quick has been selected as the 2007 recipient of the Chief Justice's Professionalism Award. This award is presented annually by the chief justice of the North Carolina Supreme Court at the Annual Meeting of the North Carolina State Bar.

Quick earned her BA from Duke University in 1970, and her JD degree with Honors from the University of North Carolina School of Law in 1974. Since her admission to the Bar that same year, she has been with the Winston-Salem firm of Womble Carlyle Sandridge & Rice, specializing in wills, trusts, estates, and charitable giving.

During 1997-98, Quick served as president of the North Carolina Bar Association. While serving as president, Quick renewed her commitment to the profession by promoting the highest professional standards for lawyers. She is a member of the American, North Carolina, and Forsyth County Bar Associations, and is past-treasurer of the Forsyth County Bar Association. She is also past-president of the Winston-Salem Estate Planning Council; fellow and past state chairman of the American College of Trust and Estate Counsel; past articles editor of *Probate and Property* (a publication of the Real Property and Probate Section of the American Bar Association); author and principal editor of *The North Carolina Estate Administration Manual*; past member of the North Carolina State Bar Board of Law Examiners; and a former chair of the Winston-Salem Foundation Committee.

As a past-president of the North Carolina Bar Association, she continues to serve on several committees related to the association. She was among the first to be appointed by the chief justice of the North Carolina Supreme Court to serve on the Chief Justice's Commission on Professionalism.

From 1988 to the present, she has been selected as one of the Best Lawyers in America for probate and estate planning. In 2001 she received the YWCA Award for Career Leadership. She has been named as one of North Carolina's "Legal Elite" in Business North Carolina each year since 2002, and was selected the best among the Legal Elite in the field of tax and estate planning. Her peers have selected her to be included in The Best Lawyers in America.

Quick has a strong interest in promoting philanthropy and has worked with a number of charitable organizations and foundations, including serving as a board member on a large private foundation and her local community foundation. ■

2008 Appointments to Boards and Commissions

January Council Meeting

Lawyer Assistance Program Board (3-year terms) There are three appointments to be made. Dr. Al Mooney, Paul Kohut, and Nancy S. Ferguson are eligible for reappointment.

April Council Meeting

Disciplinary Hearing Commission (3-year terms) There are four appointments to be made. J. Michael Booe, Sharon B. Alexander, and Donna R. Rascoe are eligible for reappointment. M. Ann Reed is not eligible for reappointment.

July Council Meeting

Board of Legal Specialization (3-year terms) There are three appointments to be made. Terri L. Gardner and Michael E. Weddington are not eligible for reappointment. Steven L. Jordan (public member) is eligible for reappointment.

IOLTA Board of Trustees (3-year terms) There are three appointments to be made. Robert G. Baynes and Brenda B. Becton are eligible for reappointment. James M. Talley Jr. is not eligible for reappointment.

October Council Meeting

Board of Continuing Legal Education (3-year terms) There are three appointments to be made. Renee Hill and Susan M. Parrott are eligible for reappointment. Stephen D. Coggins is not eligible for reappointment.

Board of Law Examiners (3-year terms) There are three appointments to be made. Jaye P. Meyer, Roy W. Davis, and James R. Van Camp are eligible for reappointment.

Board of Paralegal Certification (3-year terms) There are three appointments to be made. Barry D. Mann, D. Grace Carter (paralegal), and Marguerite J. Watson (paralegal) are eligible for reappointment.

Client Security Fund Board (5-year terms) There is one appointment to be made. Fred H. Moody Jr. is not eligible for reappointment.

NC Judicial Standards Commission (6-year terms) There are two appointments to be made. William O. King is not eligible for reappointment. L. P. Hornthal is eligible for reappointment.

NC LEAF (1-year term) There is one appointment to be made. Victor J. Boone is eligible for reappointment. ■

Bar Presents Awards to Students for Pro Bono Service

Each year, the NCSB recognizes Pro Bono students of the year from each of the accredited law school programs in the state.

Renorda E. Herring is North Carolina Central University Law School's Pro Bono Student of the Year. Prior to enrolling in law school, she worked with the City of Atlanta Solicitor's Office where she developed a highly successful conflict resolution and life skills program for teen first offenders. The program's mission was to provide young adults with the knowledge, skills, and encouragement to resolve conflicts in a nonviolent manner. Throughout her three years at NCCU Law School, Ms Herring distinguished herself through her active participation in pro bono service and her leadership in organizing other students for pro bono projects. Her pro bono activities included Durham Teen Court, Youth and Law Day, numerous service projects as president of Phi Alpha Delta Law Fraternity (PAD), and participation in the Juvenile Law Clinic, Criminal Litigation Clinic, and Street Law programs. As president of PAD, Ms. Herring organized the first annual "Feed the Homeless" program where the members raised funds from the NCCU law community. In 2006, PAD fed 250 members of the Durham community for Thanksgiving.

Natalia Isenberg is this year's recipient from the Campbell University Norman Adrian Wiggins School of Law. Ms Isenberg's contributions to the law school community have been most recognizable in her commitment to, and active participation in, student organizations, including the American Bar Association Law Student Division, the North Carolina Bar Association Law Student Division, the law school Moot Court Board, Women-in-Law, and the North Carolina Association of Women Attorneys. Her contributions to the greater community have been realized through her summer internship with the Smithfield office of Legal Aid of North Carolina, and through student clerkships with both the North Carolina Court of Appeals and with the United States District Court for the Eastern District of North Carolina. She has served as the president for the Program for Older Prisoners (POPS), a student organization committed to the pro bono evaluation of, and advocacy for, the early release of North Carolina's nonviolent, older prisoners. In the spring and summer of her second year, Ms. Isenberg began to explore other avenues of service. From her efforts grew the student organization known as Prisoner Assistance and Legal Services (PALS). Through PALS, of which Ms. Isenberg also served as president, the services rendered under POPS continued, and the organization further provides pro bono legal research and other support to a far broader client base under the supervision of North Carolina Prisoner Legal Services. Throughout her law school career, Ms. Isenberg has distinguished herself by her infectious commitment to pro bono service.

Patrick Chisholm is the recipient of the 2007 North Carolina State Bar Student Pro Bono from Wake Forest University School of Law. Mr. Chisholm was involved outside the classroom in one of the law school's most active student organizations, the Public Interest Law Organization (PILO). As the administrative vice president of PILO, he worked tirelessly to insure that the traditional PILO auction successfully raised funding to provide summer living stipends for students who volunteer with public interest employers, and participated in PILO functions to encourage other students to enter the public interest arena and become involved in community service. Mr. Chisholm has been committed to working on behalf of children. His work with the Guardian Ad Litem Program in Forsyth County, which he continued during his second and third years of law school, was to ensure that individual children's voices were heard in court. The energy that he has given to providing advocacy for children who have no significant voice has enriched the community. During his summer internship, he worked for Advocates for Children's Services with Legal Aid. He also worked for the Georgia Justice Project which deals with clients of all ages and legal problems.

This year's North Carolina State Bar Student Pro Bono award from the University of North Carolina School of Law is **Joyce Kung**. Ms. Kung logged over 200 hours of pro bono work in a diverse collection of projects. She has worked with the NC Justice Center, served as a guardian ad litem, and helped the student organization Immigrants Outreach Project. Included among her many other achievements is her service as chairman of the Student Bar Association Community Service Project which helped organize Heels on the Street Community Service Day, ABA Work-a-Day events for at-risk youth, One-Student-One-Gift holiday charity campaign, and Public Interest/Public Service Retreat. She was a board member and president of the Carolina Public Interest Law Organization and helped raise $28,000 for public interest summer grants. She was a member of the Immigration Law Association and the Asian American Law Students Association.

This year's recipient of the NCSB Student Pro Bono Award from Duke University is **Lauren Alexander Mandell**. Mr. Mandell accumulated a total of 389 hours of pro bono work, in addition to community service work that he did for credit through the AIDS Legal Assistance Project and a domestic externship. Perhaps his greatest pro bono legacy was his leadership of Hurricane Katrina relief efforts. He spent spring break of his second year of law school working with evacuees in Fort Worth, Texas. He returned to Duke and founded the Duke Hurricane Relief Project through which law students assisted attorneys representing evacuees in North Carolina and elsewhere. His crowning achievement was recruiting 24 law students and an associate dean to travel with him to New Orleans and spend a week doing relief work: gutting a house, doing legal mapping of unmet needs, working in legal aid, preparing tax returns, organizing, and in Lauren's case, bringing skills he learned in the Duke Law AIDS clinic to an AIDS organization in New Orleans. Fluent in Mandarin, Mr. Mandell has also worked with the Immigrants Legal Assistance Project. He was recognized by the Duke Bar Association as the most outstanding student organization leader at Duke Law School in 2007 for these efforts. ■

Resolution of Appreciation of Steven D. Michael

WHEREAS, Steven D. Michael was elected by his fellow lawyers from the 1st Judicial District in January 1996 to serve as their representative in this body. Thereafter, he was elected for three successive three-year terms as councilor; and

WHEREAS, in October 2004 Steve Michael was elected vice-president, and in October 2005 he was elected president-elect. On October 19, 2006, he was sworn in as president of the North Carolina State Bar; and

WHEREAS, during his service to the North Carolina State Bar, Steve Michael has served on the following committees: Consumer Protection, Membership and Fees, Lawyers' Trust Accounts, Legal Aid to Indigents, Grievance, Authorized Practice, Special Committee on Real Property Closings, Issues, Legislative, Executive, and Finance and Audit; and

WHEREAS, Steve Michael assumed the presidency as the State Bar faced one of its greatest challenges, the prosecution of a disciplinary action against the elected district attorney of Durham County relative to his apparent misconduct in what has come to be known as the Duke lacrosse case. In the face of unprecedented media attention and with the realization that the State Bar's credibility as an institution was at stake, Mr. Michael led the agency throughout the entire affair in a sure handed and resolute fashion, ensuring that the matter was handled in a way that confirmed, in the minds of all sentient observers, that the legal profession could and should be trusted to govern itself and its members; and

WHEREAS, in recognition of the fact that it is through the disciplinary program that the State Bar fulfills its most essential function, President Michael initiated a searching examination of the program's structure and administration through a special committee known as the Disciplinary Advisory Committee. He directed the committee to conduct the review in collaboration with the staff, not in opposition to it and, consequently, facilitated the attainment of insights and the implementation of improvements that will advance the cause of self-regulation for years to come; and

WHEREAS, Steve Michael brought the full force of his personality and his office into the struggle for equal access to justice. During his presidency, he insisted that the profession take cognizance of the plight of North Carolinians who cannot afford the legal representation necessary to assert and safeguard their fundamental rights as citizens. In response to this crisis, Steve Michael encouraged the State Bar Council to seek legislation and adopt rules that will, for the first time, enable retired members of the Bar to donate their legal services to persons of limited means. For much the same reason, President Michael also persuaded his fellow councilors to petition the North Carolina Supreme Court for an order requiring eligible attorneys to participate in IOLTA. The imposition of this requirement will, in all likelihood, generate millions of dollars to finance increased access to justice in our state. Although the many beneficiaries of this regulation will probably never know his name or recognize his contribution, they too are greatly indebted to Steve Michael; and

WHEREAS, Mr. Michael has throughout an extraordinary year risen to every occasion as the State Bar's president. He has been engaged, he has been exemplary, and, perhaps most importantly, he has been present. Though far flung as the eastern-most president in the history of the State Bar, he has never failed to "show up" to support the staff and lead the Bar. Typical of his faithfulness and personal sacrifice was his presence during every minute of the week-long trial of *State Bar v. Nifong*. Though never calling attention to himself, he was always where he needed to be and, fortunately for the lawyers and the people of North Carolina, Steve Michael was always what we needed him to be.

NOW, THEREFORE, BE IT RESOLVED that the council of the North Carolina State Bar does hereby publicly and with deep appreciation acknowledge the strong, effective, and unselfish leadership of Steve Michael, and expresses to him its debt for his personal service and dedication to the principles of integrity, trust, honesty, and fidelity.

BE IT FURTHER RESOLVED that a copy of this resolution be made a part of the minutes of the annual meeting of the North Carolina State Bar and that a copy be delivered to Steven D. Michael.

Fifty-Year Lawyers Honored

As is traditional, members of the North Carolina State Bar who are celebrating the 50th anniversary of their admission to practice were honored during the State Bar's Annual Meeting at the 50-Year Lawyers Luncheon. One of the honorees, Mark R. Bernstein, addressed the gathering and each honoree was presented a certificate by the president of the State Bar, Steve Michael, in recognition of his or her service. After the ceremonies were concluded, the honorees in attendance sat for the photograph below. ■

Bottom row (left to right): Robert H. Swiggett Jr., Richmond G. Bernhardt Jr., Jesse L. Warren, George R. Greene, Richard E. Glaze, John Samuel Johnson, John N. Ogburn Jr., David R. Cockman, Richard T. Meek *Second row (left to right):* C. Walter Allen, John E. Duke, Henry M. Whitesides, T. Yates Dobson Jr., Joseph L. Barrier, Robert H. Sapp, Andrew H. McDaniel, Gerald C. Parker *Third row (left to right):* George W. Miller Jr., Robert E. Thomas, Mark R. Bernstein, Thomas D. Johnston

Our New President (cont.)

legal profession. The Rules of Professional Conduct are our covenant of trust with the public, and I want every lawyer to carry that responsibility and to be proud of his or her role in society.

Q: Tell us a little about your family.

My wife, Bobbie, and I have been married 37 years. We met at Chapel Hill. Her twin is married to one of my fraternity brothers who introduced us. We have two children ages 30 and 29. Our younger daughter, Laura, is mentally handicapped and lives in a group home in Charlotte. Our older daughter, Marsha, and her husband, Drew, met at UNC. They live near us in Charlotte. Drew is a Price Waterhouse consultant, and Marsha is a stay at home mom busy watching over our three grandchildren, Maggie (almost four), Drayton (two) and Hank (five months). My parents are deceased. My only sibling, my brother Ron, lives in Charlotte with his wife Vicki. They have three sons and one grandson. I am blessed to have my family close by.

Q: What do you enjoy doing when you're not practicing law or working for the State Bar?

I like watching the History Channel, old movies, and Tar Heel and Panthers football; reading historical novels and good history; bird hunting; listening to good books on CD's; traveling in the United Kingdom; relaxing in our Alleghany County restored 19th century log cabin; talking with friends about almost any subject; and spending time with my family.

Q: How would you like for your administration to be remembered when the history of the State Bar is finally written?

I hope that this administration will be remembered as one which upheld the proud traditions of the North Carolina Bar; maintained a sense of efficiency, reliability, and responsiveness; and carried the torch of trust through a time of change, growth, and challenge. ■

Annual Reports of State Bar Boards

Board of Legal Specialization

This has been a landmark year for legal specialization in North Carolina. Twenty years ago, the first North Carolina legal specialists were certified by the board. To celebrate this milestone, a dedicated issue of the State Bar *Journal* was published this summer and a reception was held October 17, 2007, to which the council and all legal specialists were invited in order to recognize the continuing success of the specialization program. The board is particularly proud of the dedicated issue of the *Journal* which enabled the board to share the celebration with all members of the bar and to let the bar know about the accomplishments of the legal specialization program over the past 20 years. We extend our thanks and appreciation to the *Journal's* editorial board for this opportunity. The superb behind-the-scenes work of Assistant Director of Specialization Denise Mullen on most of the features in the dedicated issue also deserves special recognition. Two features were of particular interest to the bar and importance to the board: the list of the many lawyers who have volunteered their time as members of certification committees to insure the quality of the certification program; and the map of North Carolina showing the penetration of legal specialization to all parts of the state including communities large and small.

As we sit here today, there are 645 board certified legal specialists in North Carolina. Here is the allocation of specialists among our eight specialities:

Bankruptcy - 77
Estate Planning - 129
Real Property - 82
Family - 144
Criminal - 89
Immigration - 18
Workers' Comp - 83
Social Security - 27

Of the total, 64 lawyers have been certified as specialists for over 20 years. This group of lawyers truly deserves recognition for being pioneers at a time when legal specialization was considered superfluous and risky (who would want to take another test after the bar exam?) and for continuing to meet the requirements for certification when re-evaluated three times over the ensuing 20 years. I am pleased to inform you that five of these pioneers have served with distinction on the State Bar Council: J. Michael Booe, Sara H. Davis, David G. Gray, James "Jimmy" W. Narron, and N. Hunter Wyche Jr.

In addition to the success of our anniversary celebration, the specialization program also enjoyed a successful year for new applications. In the spring, we received 72 applications from lawyers seeking certification. Of the applications received, 63 lawyers were approved to sit for the certification exams which will be held in two weeks. This is the fifth successive year in which more than 50 lawyers will sit for the certification exams. The Social Security Disability Law Specialty and the dual certification for bankruptcy lawyers from the American Board of Certification and the State Bar, both of which were introduced in 2006, remain popular.

Once certified, specialists rarely allow their certification to lapse as demonstrated by our pool of 20-year specialists. In January 2007, the board recertified 89 lawyers in their chosen areas of certification, and this fall we received 125 applications for recertification in 2008.

At the annual luncheon for certified specialists, the board recognized three outstanding specialists with the second annual presentation of its recognition awards. The awards were named in honor of past chairs of the Board of Legal Specialization. The Howard L. Gum Excellence in Committee Service Award is given to a specialty committee member who consistently excels in fulfilling committee responsibilities. This award was presented to Thomas C. Manning, a former chair of the Criminal Law Specialty Committee.

The James E. Cross Leadership Award is presented to a certified specialist who has taken an active leadership role in his/her practice area. Robin J. Stinson received this award for her contribution to the practice of family law.

The Sara H. Davis Excellence Award, named in honor of former councilor Sara Davis, is given to a certified specialist who exemplifies excellence in his/her daily work as an attorney and serves as a model for other lawyers. Mason T. Hogan, a specialist in Social Security disability law, was presented with this award.

Finally, the board is pleased to report that it continues to operate on a sound financial footing. In the coming months, the board will analyze its current revenue and expenditures to determine whether it is appropriate to increase its annual fee to specialists and thereby obtain additional funding to support the improvement of the program—particularly the quality of the specialization exams. You will hear more about this endeavor in coming months.

Board of Paralegal Certification

It is our great pleasure to report that, as of August 30, 2007, there are 4,477 certified North Carolina paralegals. This number clearly reflects the importance of this program to paralegals and to lawyers who are embracing paralegal certification as the "gold standard" for paralegal employees.

The board accepted the first application for certification on July 1, 2005. Since that date, over 4,768 applications have been received by the board. The period in which applicants may qualify without taking an examination ended on June 30, 2007. During the two year "alternative qualification period," every application was reviewed by the board and the Certification Committee to determine that the education, work experience, and character standards of the Plan for Certification of Paralegals were satisfied prior to certification.

Since July 1, 2007, the plans and procedures for the administration of the first certification examination have occupied the board and the Certification Committee. The Certification Committee is composed of seven exceptionally dedicated and hard-working paralegal educators, both lawyers and non-lawyers, who have devoted countless unpaid hours to the creation of a three-hour, 150 question, multiple choice examination that is comprehensive, rigorous, and fair. The committee worked with a professional psychometrician

and the exam was pre-tested by volunteer certified paralegals—including a few board members—to insure that the exam is valid and reliable. Paralegals who are certified upon successful passage of the exam will have demonstrated knowledge in those practice areas and skills that are necessary to provide competent assistance to lawyers. The first examination will be administered in spring 2008 at five test sites (South College, Asheville; UNC Charlotte; Guilford Technical Community College, Greensboro; Meredith College, Raleigh; and Pitt Community College, Greenville). Until the exam is administered, the board will focus on the somewhat ticklish task of providing information about the examination to prospective applicants and encouraging exam preparation courses without disclosing the content of the examination. On October 27, 2007, information sessions on the application process and the examination will be held at the five locations where the exam will be administered in the spring.

Over the past year, the board has accomplished the following:

- Recertified 1,706 paralegals at the end of their first year of certification.
- Converted the assistant director position from part time to full time to handle the deluge of applications.
- Developed a confidentiality pledge that must be signed by every applicant prior to taking the examination.
- Published for comment a rule amendment that specifies that the board may suspend or revoke the certification of a paralegal for violating the confidentiality pledge.
- Through the work of a three-member panel of the board, heard and decided several appeals from denials of certification.
- Since the beginning of the program, designated 33 North Carolina paralegal studies programs as qualified paralegal studies programs under the plan, in addition to the four North Carolina programs that are currently approved by the ABA.

At the end of 2006, the board was able to repay, in full, the $50,000 "seed money" allocated to the program by the State Bar Council in 2005. We are happy to report that the program continues to operate in the black and, as of September 30, 2007, has over $400,000 in excess revenue. The board believes that the first two years of the program showed exceptional growth, and attendant revenue, because of the pent-up desire for a certification program and because applicants could qualify through work experience during the alternative qualification period. With the conversion to certification-by-examination and the requirement that an applicant hold a degree from a qualified paralegal studies program, it is anticipated that the number of applications and revenue will decline. In 2008, the board will analyze the present and future needs of the program to determine how the "nest egg" of funds from the first two years of operation should be used to support the program over the long run and to advance the goals of the certification program, described as follows in the Plan for Certification of Paralegals:

> to assist in the delivery of legal services to the public by identifying individuals who are qualified by education and training and have demonstrated knowledge, skill, and proficiency to perform substantive legal work under the direction and supervision of a licensed lawyer, and including any individual who may be otherwise authorized by applicable state or federal law to provide legal services directly to the public; and to improve the competency of those individuals by establishing mandatory continuing legal education and other requirements of certification.

The board believes that the certification program has helped the public and the legal profession by identifying qualified paralegals and providing paralegals with the impetus for self-improvement that comes with a meaningful professional designation. We are pleased that paralegal certification has been embraced by paralegals and by the lawyers who employ them.

Board of Continuing Legal Education

I am pleased to report that 99% of the active members of the North Carolina State Bar complied with the mandatory CLE requirements for 2006. The majority of outstanding compliance issues from 2006 will be resolved by the end of 2007. By mid-March 2007, the CLE department processed and filed over 19,581 annual report forms for the 2006 compliance year. North Carolina lawyers took a total of 292,306 hours of CLE in 2006, or approximately 16 CLE hours on average per lawyer. This is 4 hours above the mandated 12 CLE hours per year and a substantial increase over 2005 when lawyers took only an extra 2.5 hours on average. It appears that many lawyers recognize that continuing their professional education is not just a requirement of bar membership but essential to the competent practice of law.

On March 8, 2007, the Supreme Court approved significant amendments to the rules and regulations governing the administration of the CLE program. These amendments create standards for accreditation of courses on law practice management, skills training, and technology. The rule amendments clarify that CLE credit will only be granted to courses that have as their primary objective increasing the participant's professional competence and proficiency as a lawyer. The board continues to study whether courses on stress reduction or stress management (sometimes referred to as "quality of life" programs) should be accredited and, if so, how to define the characteristics of and limitations on creditworthy programs. In light of the relationship between the stress of legal practice and the high incidence of depression and substance abuse among lawyers, the board is considering the inclusion of stress reduction education in the one hour on substance abuse and debilitating mental conditions lawyers are required to take every three years. The board is also studying the definition of "professionalism" courses with an eye to expanding the definition to include diversity education.

The CLE website, www.nccle.org, was updated this year to make the site visually compatible with the other State Bar websites and to make it easier for a member of the State Bar to search his or her individual CLE record. Overall, the site is better organized and more user friendly. Many members rely on the site to view their "real time" CLE transcripts and to locate appropriate CLE courses on the online course database. Next year, from the end of January through mid-March 2008, lawyers will be able to download a PDF version of the 2007 annual report form.

Other actions and activities of the board this year include the following:

- Publication of proposed rule amendments which will allow 45 days for the processing of accreditation applications; require submission of only one set of written materials for accreditation; and charge interest at the legal rate on sponsor fees that are not remitted to the board by an accredited sponsor within 30 days of the presentation of a course as required by the CLE rules.
- Sound financial operation of the CLE program including the provision of $172,516.18 in funding for the support of the Lawyers Assistance Program. (The board supports LAP at $150,000 or an amount equal to

50% of the CLE department's projected expenses for the year—not including the LAP support—whichever is greater).

- Development of a policy on the effect on the CLE credits granted to participants when a program presented by an accredited sponsor is subsequently determined not to be worthy of the CLE credit as advertised by the sponsor.

The board will continue to strive to improve the program of mandatory continuing legal education for North Carolina lawyers. We welcome any recommendations or suggestions that councilors may have in this regard. On behalf of the other members of the board, I would like to thank you for the opportunity to contribute to the protection of the public by advancing the competency of North Carolina lawyers.

Client Security Fund

Pursuant to the Rules of Administration and Governance of the Client Security Fund of The North Carolina State Bar (the "Fund"), the Board of Trustees submits this annual report covering the period October 1, 2006, through September 30, 2007.

The Fund was established by order of the Supreme Court dated October 10, 1984, and commenced operations January 1, 1985. As stated by the Supreme Court, the purpose of the Fund is "...to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court and [the] Rules, clients who have suffered financial loss as a result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina..."

Claims Procedures

The Fund reimburses clients of North Carolina attorneys where there was wrongful taking of the clients' money or property in the nature of embezzlement or conversion, which money or property was entrusted to the attorney by the client by reason of an attorney/client relationship or a fiduciary relationship customary in the practice of law. Applicants are required to show that they have exhausted all viable means to collect those losses from sources other than the Fund as a condition to reimbursement by the Fund.

Specific provisions in the Rules declare the following types of losses to be nonreimbursable:

1. Losses of spouses, parents, grandparents, children, siblings, partners, associates, or employees of the attorney.

2. Losses covered by a bond, security agreement, or insurance contract, to the extent covered.

3. Losses by any business entity with which the attorney or any person described in paragraph one above is an officer, director, shareholder, partner, joint venturer, promoter, or employee.

4. Losses which have been otherwise reimbursed by or on behalf of the attorney.

5. Losses in investment transactions in which there was neither a contemporaneous attorney/client relationship nor a contemporaneous fiduciary relationship.

All reimbursements are a matter of grace in the sole discretion of the board and not a matter of right. Reimbursement may not exceed $100,000 to any one applicant based on the dishonest conduct of an attorney.

The Board of Trustees

The board is composed of five trustees appointed by the council of the State Bar. A trustee may serve only one full five-year term. Four of the trustees must be attorneys admitted to practice law in North Carolina and one must be a person who is not a licensed attorney. Current members of the board are:

Fred H. Moody Jr., chair, is a partner with the firm of Moody & Brigham, PLLC, in Bryson City, North Carolina.

Janice McKenzie Cole, vice-chair, is with Cole Immigration Law Center in Hertford, North Carolina.

Henry L. White, the public member of the board, is a CPA and partner with the accounting firm of Stancil and Company in Raleigh, North Carolina.

G. Thomas Davis Jr. is with the firm of Davis and Davis in Swan Quarter, North Carolina.

Sara H. Davis is with the firm of Westall, Gray, Connolly & Davis, PA, in Asheville, North Carolina.

Subrogation Recoveries

It is standard procedure to send a demand letter to each attorney or former attorney whose misconduct results in any payment, making demand that the attorney either reimburse the Fund in full or confess judgment and agree to a reasonable payment schedule. If the attorney fails or refuses to do either, suit is filed unless the investigative file clearly establishes that it would be useless to do so.

In cases in which the defrauded client has already obtained a judgment against the attorney, the Fund requires that the judgment be assigned to it prior to any reimbursement. In North Carolina criminal cases involving embezzlement of client funds by attorneys, our counsel, working with the district attorney, is sometimes able to have restitution ordered as part of the criminal judgment.

Another method of recovering amounts the Fund pays to clients of a dishonest attorney is by being subrogated to the rights of clients whose funds have been "frozen" in the attorney's trust account during the State Bar's disciplinary investigation. When the court disburses the funds from the trust account, the Fund gets a pro-rata share.

During the year covered by this report, the Fund recovered $82,330.27 as a result of these efforts. Hopefully, our efforts to recover under our subrogation rights will continue to show positive results.

Claims Decided

During the period October 1, 2006-September 30, 2007, the board decided 183 claims, compared to 300 claims decided the previous reporting year. Those 183 claims were based upon allegations of dishonest conduct by a total of 58 attorneys or former attorneys. As filed, they totaled $1,289,103.37. For various reasons under its rules, the board denied 76 of the 183 claims in their entirety. Of the 107 remaining claims, involving 22 attorneys or former attorneys, some were paid in part and some in full. Reimbursements of those 107 claims totaled $414,460.92, an average of $3,873.47 per claim. The largest amount paid on a single claim was $68,123.99, and the smallest amount paid was $70.00. The most common basis for denying a claim in its entirety is that the claim is a "fee dispute" or "performance dispute." That is, there is no allegation or evidence that the attorney embezzled or misappropriated any money or property of the client. Rather, the client feels that the attorney did not earn all or some part of the fee paid or mishandled or neglected the client's legal matter. However meritorious the client's contentions may be, the Fund is not permitted to reimburse the clients in those cases because of the requirement in the rules that a wrongful taking of money or property in the nature of embezzlement or conversion must be shown.

Funding

The 1984 order of the Supreme Court that created the Fund contained provisions for an assessment of $50.00 to provide initial funding

for the program. In subsequent years, upon being advised of the financial condition of the Fund, the Court in certain years waived the assessment and in other years set the assessment in varying amounts to provide for the anticipated needs of the Fund.

In 1999, the Supreme Court approved a $20 assessment per active lawyer that was to continue from year to year until circumstances required a modification. For the years beginning October 2004 and October 2005, due to significant embezzlements by a small number of attorneys, a modification was required and a $50 assessment was ordered. Last year, the Supreme Court returned to an annual assessment, but increased that annual assessment to $25, the average assessment for the previous ten years. There is no need for a special assessment for 2007-2008.

Conclusion

The Board of Trustees wishes to convey to the council our sincere appreciation to the staff personnel who have assisted us so effectively and generously during the past year. Without the continuous support of these people, our tasks would be much more difficult. We also express our appreciation to the bar of North Carolina for their continued support of the Client Security Fund and their efforts in reducing the incidents of defalcation on the part of a few members of our profession.

Lawyer Assistance Program

It has been a busy and productive year for the LAP. The State Bar's rule governing the Lawyer Assistance Program provides:

> .0601 Purpose
>
> The purpose of the lawyer assistance program is to: (1) protect the public by assisting lawyers and judges who are professionally impaired by reason of substance abuse, addiction, or debilitating mental condition; (2) assist impaired lawyers and judges in recovery; and (3) educate lawyers and judges concerning the causes of and remedies for such impairment.

The LAP is fulfilling its mission. Since 2000 the LAP has assisted over 1,321 lawyers, which are about six percent of the bar and often include the bar's most disadvantaged and distressed members.

LAP has closed 806 files since 2000. During 2007, 33 active files were closed.

During the year the bar experienced a suicide triggered by a discipline investigation. In response, the LAP Board has considered how the LAP might help in reducing the risk of discipline-triggered suicides.

One way LAP can be helpful is to offer suicide prevention training and provide LAP volunteers. The suicide prevention training would be provided to Bar investigators and others who serve subpoenas and are involved in other triggering events, and to LAP volunteers who have agreed to meet with at-risk lawyers who have been identified to the LAP by Bar Discipline. To that end, Towanda Garner, a LAP clinician, has been receiving training to be certified to teach a basic suicide prevention course to Bar investigators and LAP volunteers.

The LAP Board also explored the idea of providing a letter to discipline for use to inform lawyers under investigation of the LAP's role in helping lawyers. Research of other Bars showed that many do provide such letters and that these letters emphasize that the Lawyer Assistance Program is separate from discipline, that the process of responding to a grievance can be stressful in and of itself, and that confidential assistance is available if the lawyer wishes.

There are no Bars that automatically send such a letter in the case of an initial grievance. Ohio, which has a close working relationship with its Discipline Counsel, indicated that they considered this possibility, but rejected doing so because it would too closely identify the LAP with discipline. Also, at this stage, there are many grievances that are not well founded, and it would risk associating the LAP with such baseless grievances or inferring to a lawyer that he needed help just because he faced a meritless grievance.

The LAP Board believes that such a letter should only be sent in cases involving show cause orders or subpoenas, which historically are triggering events for suicides. A letter developed by the LAP is being provided to discipline for its use in appropriate situations.

Indiana has an interesting form of outreach. Under Indiana's rules, a lawyer convicted of any crime is required to report the conviction to Bar Discipline. When Bar Discipline gets notification from a lawyer that he has been convicted of driving under the influence or similar offense, Bar Discipline notifies the lawyer that this isolated incident will not be a subject of disciplinary proceeding, but suggests that the lawyer consult with the LAP for an evaluation.

At the end of September 2007, the LAP had 434 open files, which reflects assistance being provided on the basis of more than one new file every day and continues to place substantial time on our professional staff and cadre of volunteers. These staff and volunteer efforts prevented or limited possible harm to the public in numerous incidents. In cases where discipline is initially deferred or the lawyer is operating under a stayed suspension, the LAP's intervention offers the opportunity to actually identify and resolve the root problem out of which the discipline problem arose and furthers the vital mission of protecting the public.

Details of the North Carolina Lawyer Assistance Program

The Lawyer Assistance Program (LAP) provides assessment, referral, intervention, education, advocacy, and peer support services for all North Carolina lawyers and judges.

The LAP is designed to help lawyers find a way to address a wide range of health and personal issues, including, most commonly, alcohol/drug abuse, stress/burnout, depression, anxiety, and compulsivity disorders of all kinds, including those involving food, sex, gambling, and the Internet.

All calls are strictly confidential.

Educational Outreach

The Lawyer Assistance Program sponsored several presentations and video presentations across the state in 2006-2007.

LAP Information Flyers

- PALS: Alcoholism and Other Chemical Addictions
- FRIENDS: Depression and Mental Health
- A Guide for North Carolina Judges: Dealing with an Impaired Lawyer
- Black Lawyers Association Leadership Urges Members Use of Lawyer Assistance Program
- Breaking the Silence - Lawyer Suicide
- A Chance to Serve
- Welcome to the Legal Profession
- Women Bar Leaders Encourage Use of Lawyer Assistance Program
- Impairment in the Legal Profession - A Guide for New Bar Councilors and Local Bar Leaders

LAP flyers are used in new lawyer packages, volunteer packages, and requests for information by prospective clients and in CLE programs. Approximately 2,020 flyers were distributed in the presentations made this past year with 861 Welcome Flyers were distributed to new admittees.

The LAP book *A Lawyer's Guide to Healing* has been distributed as part of the LAP's out-

reach.

Articles

PALS and FRIENDS columns are submitted quarterly to the *Journal*. Monthly articles are submitted to the Campbell Law *Observer* to develop awareness of the Lawyer Assistance Program and impairing issues lawyers may face.

Volunteer Development

Substantial efforts continue to be devoted to volunteer development. As of September 30, 2007, there were 126 PALS volunteers and 106 FRIENDS volunteers.

Training

The 27th PALS Annual Conference and Workshop was held at Carolina Beach, North Carolina, on November 3-5, 2006.

FRIENDS 8th Annual Conference was held on February 10, 2007, at Mid Pines, Southern Pines, NC. The 2007 conference was a joint program with BarCares and the Quality of Life Committee of the North Carolina Bar Association

ABA CoLAP Conference was held in Nova Scotia, Canada, on October 1- 6, 2007.

The 28th Annual PALS Meeting and Workshop was held on October 12-14, 2007, in Boone, NC. Guest speakers included John Ishee, and Kristi and Todd Webb.

Upcoming Events for 2008

The FRIENDS 9th Annual Conference will be held on February 9, 2008. This conference will be in conjunction with BarCares and the NC Bar Association Quality of Life Committee.

The 29th Annual PALS Conference and Workshop will be held on November 7-9, 2008, in Wrightsville Beach, NC.

Local Volunteer Meetings

The Lawyer Assistance Program continues the development of local volunteer meetings to provide greater continuity and support in meeting the needs of lawyers new in recovery and allowing volunteers the chance to grow in their own recoveries. Local volunteer support meetings for PALS and FRIENDS are held in several locations. Details on meeting locations are available on the LAP website—www.nclap.org.

Volunteer Communication

The LAP sends out *The Intervenor* newsletter to all PALS volunteers three to four times a year to enhance communication among the volunteer network. Volunteers have contributed by writing articles for *The Intervenor* and by sharing personal stories in the *CLO* and the *Journal*.

Case Management

Case management has four different stages:

1. Investigation - Initial contact with the program begins the investigative phase. All efforts at this stage are directed to determining if the lawyer has a problem with which LAP can assist, the nature of the problem, and if the client is willing to get assistance.

2. Treatment/Stabilization - This phase begins when a lawyer understands that he/she needs help and agrees to obtain assistance.

3. Monitoring/Aftercare - This begins when a lawyer has completed inpatient/outpatient treatment or initial therapy consultations and is stabilized in a recovery program. In this stage, the volunteer support is most active and helpful.

4. Inactive Status - A file is placed on inactive status when the active role of the LAP terminates. This may occur when the lawyer completes an initial two-year contract of monitoring and no longer needs a monitor, lawyer dies, moved out of state, is disbarred, or no longer wants any assistance.

Case Management Statistics

A self-referral might be appropriate for a phone evaluation and immediate referral to a treating counselor. On the other hand, a third party initiated investigation may take weeks to complete and, even then, the file may be put on hold for months in order for there to be sufficient opportunity to ascertain if the lawyer truly needs assistance. Every effort is made not to interfere unless there is meaningful evidence suggesting that it is needed or the lawyer is actively seeking help. Even then, in the addictions area, assistance when offered is often refused at first and the LAP may spend months building up trust so that assistance can be received when the lawyer becomes receptive. Like cases in law practice, the problem cases can often take tremendous amounts of time to move forward. Our approach is never to give up on offering help. To be able to make client access to the LAP easier, the state of North Carolina is divided into three sections. Don Carroll handles cases in the western part of the state, Towanda Garner handles the piedmont section, and Ed Ward the eastern part of the state. Of course, any lawyer may seek the help of any member of the professional staff. The continued expansion and utilization of trained volunteers will remain key in the future to bringing assistance to more lawyers who need it.

Outcome Data

The cases that have been coded as successfully handled are a broad category that emphasizes help to the lawyer. First and foremost this includes cases where the client had a significant problem and entered into a recovery contract with the LAP and successfully completed the contract. In addition, it includes cases where there was informal assistance given and a positive result achieved. This category also includes cases where an investigation was made, or the client contacted and offered assistance, with the result that no further action was needed, as well as cases that were investigated, the investigation was inconclusive as to the need for assistance, and the case was closed after two years when no new information appeared that help was needed. The success category does not include lawyers who died, went on disability status, were disbarred, or moved out of state. While these categories reflect elimination of potential harm to the public, they do not show that a lawyer was actually helped. More significantly, unsuccessful outcomes are the cases where a contract was entered into and the client failed in his or her efforts to achieve recovery, where a client went to treatment and left treatment and did not pursue recovery, and cases found unsuitable for the LAP.

Since 2000, there have been 806 active case files closed. Of these, a successful outcome was obtained in 677 and an unsuccessful outcome occurred in 129, for a favorable success rate of 84%. Of these close cases, 453 were for addiction issues and 353 for mental health. For addiction cases there is a success rate of 85% and for the mental health a success rate of 82%.

The LAP is currently handling 434 files. There are 203 PALS and 231 FRIENDS files.

PALS Referrals:	FRIENDS Referrals:
BOLE - 15	BOLE - 1
Friend - 3	Friend - 2
Family- 8	Family - 2
DHC - 3	DHC - 6
Bar Staff - 9	Bar Staff - 17
Other Lawyer - 59	Other Lawyer - 44
Self - 61	Self - 116
Firm - 11	Grievance - 19
Judge - 8	Firm - 9
DA - 1	Another LAP - 1
Bar Examiner - 2	Judge - 6
Grievance - 11	Local Bar - 1
Unknown - 9	EAP - 1
Law School - 2	Investigators/SCA - 1
Local Bar - 1	Unknown - 5

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February 2008 Bar Exam Applicants

The February 2008 Bar Examination will be held in Raleigh on February 26 and 27, 2008. Published below are the names of the applicants whose applications were received on or before October 19, 2007. Members are requested to examine it and notify the board in a signed letter of any information which might influence the board in considering the general fitness of any applicant for admission. Correspondence should be directed to Fred P. Parker III, Executive Director, Board of Law Examiners, PO Box 2946, Raleigh, NC 27602.

Alton Luther Absher Jr.
Winston-Salem, NC
Deaundrea Tanette Adams
Greenville, NC
Dawnwin Howard Allen
Hartsville, SC
Thomas Arthur Allen
Raleigh, NC
Vallisia Rena Allen
Charlotte, NC
Vickie Allison-Spencer
Greensboro, NC
Dorothee Anna Alsentzer
Charlotte, NC
Cara Capponi Amo
Charlotte, NC
Andrea Anders
Salisbury, NC
Don William Anthony
Charlotte, NC
Amanda Frost Armstrong
Greenacres, FL
Scott Alan Armstrong
Greenacres, FL
William Ronald Arnette
Mooresville, NC
Tranny Philander Arnold IV
Charlotte, NC
Janan Ileen Assaf
Irvine, CA
Frances Kelly Atkins
Wilmington, NC
Tasha Dene' Auton
Conover, NC
Thomas Lenoir Avery III
Charlotte, NC
Amanda Marie Baxley
Raleigh, NC
Daniel Richard Bache
Charlotte, NC
Ralph Joseph Baldino
Charlotte, NC
Bridget L. Baranyai
Lewisburg, PA
Lawrence Anthony Baratta Jr.
Charlotte, NC
Sarah House Barcellona
Concord, NC
Andre Jarmaine Barnett
Alexandria, VA
Aaron Thomas Beck
Charlotte, NC
Shana Norma Becker
Raleigh, NC
Aaron Lee Bell
Aberdeen, NC
Jillian McConnell Benson
Winston-Salem, NC
Eric Austin Berg
Durham, NC
Pavana Banari Bhat
Vass, NC
Nishant Bhatnagar
South Portland, ME
Robert Michael Birch Jr.
Birmingham, AL
Kimberly Dianne Blackwell
Chapel Hill, NC
Marjorie Griffin Blaney
Matthews, NC
Neil Thomas Bloomfield
New York, NY
Bethany Ann Blundy
Cary, NC
Joshua Raphael Boberg
Roxboro, NC
Dan Wilson Bolton
San Antonio, TX
Jacqueline Yvonne Bourdon London
Miami Beach, FL
Gary James Bowers
Thomasville, NC
Karla Larenda Boyd
Charlotte, NC
Gregory Albert Braun
Chapel Hill, NC
Meredith Leigh Britt
Chapel Hill, NC
Brennan Tyler Brooks
Nashville, TN
Eugene Jumerle Brown
Charlotte, NC
Ryan Aren Brown
Lenoir, NC
Susannah Lynn Brown
Pilot Mountain, NC
Tammye Campbell Brown
Cary, NC
Benjamin Joseph Brummel
Eugene, OR
Cristina Rose Buffington
Wilmington, NC
Porsha Nicole Buresh
Winston-Salem, NC
Shawn Emery Buresh
Winston-Salem, NC
Beverly Jeanette Byrum
Charlotte, NC
Laverne Bobbie Campese
Euclid, OH
Enzo F. Cannizzo
Staten Island, NY
Thomas Jefferson Carmon III
Snow Hill, NC
Peter Hugh Carney
Delray Beach, FL
Robert Francis Carr
High Point, NC
Gabriela Guadalupe Castillo
Indian Trail, NC
Tina Marie Cecil
Durham, NC
Megan Elizabeth Chalker
Charlotte, NC
Derrick Evan Champagne
Charlotte, NC
Adrian Va'Shay Chandler
Gainesville, FL
Judy Chang
Los Angeles, CA
Nalina Victor Chinnasami
High Point, NC
Do Yun Cho
Falls Church, VA
Jinwook Choi
Buford, GA
Karen Bell Clark
Charlotte, NC
Monica Renee Cloud
Raleigh, NC
Christine Blythe Coffron
Charlotte, NC
Theresa Conduah
Charlotte, NC
David Russel Cook
Washington, NC
Richard Preston Cook
Greensboro, NC
Melanie Elizabeth Page Cooper
Cool Ridge, WV
Ashley Brooke Cornwell
Fort Mill, SC
Josiah John Corrigan
Trent Woods, NC
Kate Trott Cosner
Sparta, NC
Josh Jacob Costner
Concord, NC
John Brandon Creech
Apex, NC
Melanie Shaunda Creech
Charlotte, NC
Andrew George Croshaw
Charlotte, NC
Christina Valerie Crowe
Syracuse, NY
Karen Daniels Dane
Manteo, NC
DeLisa Levette Daniels
Greensboro, NC
Silas Vondell Darden
Fayetteville, NC
Darlene Smith Davis
Durham, NC
Troy Garrett Davis
Long Beach, CA
Prentice Kelly Dawkins
Sanford, NC
James John DeLuca
Midland Park, NJ
Lindesy Laine Deere
Raleigh, NC
Sara Beth Dehne
Charlotte, NC
Charles David Detweiler
Raleigh, NC
Joseph John Di Noia II
Durham, NC
Benjamin Scott Dickens
Winston-Salem, NC
Adam Karl Doerr
Charlotte, NC
Stephen Glenn Domer
Philadelphia, PA
Jan Erik Dormsjo Jr.
Morrisville, NC
William H. Drumm
Sarasota, FL
Christopher James Drummond
Raleigh, NC
Kirsten Elvin Dubose
Pembroke PInes, FL
Kellie Lyn Duckering
Toledo, OH
Jennifer Hahn Dupuy
Cary, NC
Mary Marjorie Earnest
Fort Lauderdale, FL
Howard Jamaal Edwards
Cherryville, NC
John Gary Eichelberger Jr.
Durham, NC
Michael Anders Esser
Chapel Hill, NC
Gina Elisa Essey
Oak Island, NC
Summer Danielle Eudy
Charleston, SC
Brandon Lee Evans
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Annual Reports (cont.)

Governance

Under the rules of the NC State Bar Council, the Lawyer Assistance Program is governed by a nine member board. The NC State Bar Council appoints the members of the Lawyer Assistance Program Board in three different groups: three councilors of the NC State Bar; three persons with experience and training in the fields of mental health, substance abuse, and addiction; and three Bar members who currently serve as volunteers to the Lawyer Assistance Program. In order to avoid any perception that the LAP is not entirely separate from discipline, no member of the Grievance Committee may serve on the LAP Board. The current members of the LAP Board are: Samuel F. Davis Jr., chair of LAP and councilor; Fred F. Williams, vice-chair of LAP and volunteer; Mark W. Merritt, councilor; Burley B. Mitchell Jr.; Sheryl T. Friedrichs, volunteer; Nancy S. Ferguson, councilor; Paul A. Kohut, volunteer; Dr. Al Mooney; and Barbara Scarboro.

LAP Board Meetings Scheduled for 2008

The LAP Board meets quarterly during the time of the council meetings, except in the fall when the LAP Board meets if necessary at the time of the annual PALS training meeting.

LAP Board meetings are usually scheduled for lunchtime on the Thursday of the week the council meets. The schedule for the council is listed below:

January 22-25, 2008
Sheraton Capital Center, Raleigh
April 22-25, 2008
Sheraton Capital Center, Raleigh
July 15-18, 2008
Date Not Confirmed, Site TBD ■

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